264 N.C. App.—No. 4 Pages 642-754

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 20, 2020

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 26 MARCH AND 2 APRIL 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

JACQUELINE L. GRAY AND MARY STEWART GRAY, PLAINTIFFS
v.
FEDERAL NATIONAL MORTGAGE ASSOCIATION A/K/A FANNIE MAE, AND TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA18-871

Filed 26 March 2019

1. Appeal and Error—interlocutory order—substantial right—applicability of collateral estoppel—colorable claim

In a civil action against a trustee in a non-judicial foreclosure seeking to nullify the foreclosure for lack of notice, the order denying the trustee's motion for summary judgment was immediately appealable where the trustee raised a colorable claim that principles of res judicata and collateral estoppel might act to bar plaintiff's claims challenging the validity of the foreclosure. Such principles potentially apply to situations where a clerk has entered an order authorizing foreclosure.

2. Collateral Estoppel and Res Judicata—non-judicial foreclosure—opportunity to litigate—subsequent civil claims—improper collateral attack

In a civil action challenging the validity of a non-judicial foreclosure, plaintiffs received notice of the foreclosure hearing, including a description of the property secured by the deed of trust upon which the trustee intended to foreclose, and therefore had a full and fair opportunity to litigate whether the trustee had authority to foreclose on the property. Thus, plaintiffs were collaterally estopped from pursuing their claims and damages, all of which were based on issues previously determined by the clerk in its order authorizing foreclosure.

Judge BRYANT concurring in the result only.

Appeal by defendants from order entered 13 March 2018 by Judge Wayland J. Sermons, Jr. in Dare County Superior Court. Heard in the Court of Appeals 29 January 2019.

Nexsen Pruet PLLC, by Norman W. Shearin and George T. Smith III, for plaintiffs-appellees.

Brock & Scott, PLLC, by Alan M. Presel, for defendant-appellant Trustee Services of Carolina, LLC.

DAVIS, Judge.

In this appeal, we consider the applicability of the doctrine of collateral estoppel to an order by a clerk of court authorizing a trustee to conduct a sale in a non-judicial foreclosure proceeding pursuant to a deed of trust. Trustee Services of Carolina, LLC ("TSC") appeals from an order denying its motion for summary judgment as to claims by the debtors for monetary damages stemming from the foreclosure. Because we conclude the debtors' claims are, in fact, barred by collateral estoppel, we reverse the trial court's order and remand for further proceedings.

Factual and Procedural Background

On 24 March 2006, Mary B. Gray and her husband, Jack S. Gray, executed and delivered a promissory note to Wells Fargo Bank in the amount of $300,240 as part of a reverse mortgage loan transaction. As security for the promissory note, the Grays executed a deed of trust (the "Deed of Trust") on property that they owned in Dare County, North Carolina.

The description of the collateral contained in the Deed of Trust described a tract of land that encompassed both the Grays' primary residence as well as the home of Grace Balance Peele, one of their relatives. Following the recordation of the Deed of Trust, the Grays subsequently subdivided the parcel of land containing their primary residence from the parcel containing Peele's home.

Mary Gray and Jack Gray died on 21 March 2012 and 10 December 2013, respectively. Jacqueline L. Gray and Mary Stewart Gray (collectively "Plaintiffs") are the only devisees of Mary and Jack Gray. Peele's residence was devised to Jacqueline Gray pursuant to the terms of Jack Gray's will.

Following Jack Gray's death, Wells Fargo proceeded to accelerate the outstanding balance of the reverse mortgage loan. After providing notice of default on the loan to the Grays' estates, Wells Fargo instructed TSC to initiate non-judicial foreclosure proceedings pursuant to the Deed of Trust.

On 27 March 2015, Plaintiffs were provided with notice of a hearing in connection with the planned foreclosure proceeding. The hearing took place on 16 July 2015. Following the hearing, the Dare County assistant clerk of court entered an order that same day authorizing TSC to proceed with foreclosure. Pursuant to the order, TSC

provided notice to Plaintiffs of the upcoming foreclosure sale, which included a legal description of the property listed in the Deed of Trust.

At the foreclosure sale, Wells Fargo submitted the highest bid and purchased the property for $187,500. Wells Fargo's bid was assigned to Federal National Mortgage Association ("Fannie Mae"), and on 29 September 2015 TSC executed and delivered a deed to Fannie Mae that included the same description of the collateral contained in the Deed of Trust.

On 9 September 2016, Plaintiffs filed a complaint against TSC and Fannie Mae in Dare County Superior Court. In their complaint, they alleged that the description of the property contained in the Deed of Trust erroneously included the land on which Peele's residence was situated. They further contended that they had received no notice of the inclusion of the land containing Peele's home in the description of the property specified in the notice of foreclosure and that these mistakes "render[ed] [the foreclosure sale] a nullity." Plaintiffs' complaint asserted six claims for relief, including (1) a declaration that the foreclosure sale was a nullity; (2) mutual mistake; (3) unjust enrichment; (4) a violation of the North Carolina Reverse Mortgage Act; (5) breach of fiduciary duty; and (6) unfair and deceptive trade practices.

On 31 July 2017, TSC filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on the ground that the order entered by the assistant clerk of court authorizing the foreclosure had constituted a final judgment and that Plaintiffs' claims were therefore barred pursuant to the doctrine of collateral estoppel. TSC's motion was heard on 5 March 2018 before the Honorable Wayland J. Sermons, Jr. On 13 March 2018, the trial court entered an order denying TSC's motion. TSC gave notice of appeal to this Court.

Analysis

I. Appellate Jurisdiction

[1] Plaintiffs have moved to dismiss this appeal on the ground that the trial court's order was interlocutory. Therefore, we must initially determine whether we possess appellate jurisdiction.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final

decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

The trial court's 13 March 2018 order was not a final judgment as it did not fully resolve the claims asserted by the parties. Nor did the trial court purport to certify it for immediate appeal under Rule 54(b). Therefore, TSC's appeal is proper only if it is able to demonstrate a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." (citation omitted)).

It is well established that the denial of a motion for summary judgment "affects a substantial right when the motion . . . makes a colorable assertion that [a] claim is barred under the doctrine of collateral estoppel." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Id.* (citation, quotation marks, and ellipsis omitted). Thus, we must determine whether TSC has made a colorable

argument that the doctrine of collateral estoppel applies in this context so as to enable us to exercise appellate jurisdiction over this appeal.

Our Supreme Court addressed the applicability of collateral estoppel and res judicata in the foreclosure context in *In re Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016). In *Lucks*, an acting substitute trustee under a deed of trust initiated a non-judicial foreclosure proceeding after the borrower on the note failed to make payments. *Lucks*, 369 N.C. at 224, 794 S.E.2d at 503. The assistant clerk of court refused to authorize the foreclosure based upon a lack of necessary documentation regarding the appointment of the substitute trustee. *Id.* The following year, a different acting substitute trustee brought another non-judicial foreclosure proceeding. At the second hearing, the assistant clerk determined that "proper documentation established that [the prior acting trustee] was the Trustee at the time of the prior dismissal[.]" *Id.* (quotation marks and brackets omitted). The assistant clerk further ruled that the second acting substitute trustee was in privity with the prior substitute trustee and refused to authorize foreclosure based on the doctrine of res judicata. *Id.*

On appeal, our Supreme Court held that the assistant clerk had erred by applying res judicata principles because "[n]on-judicial foreclosure is not a judicial action." *Id.* at 229, 794 S.E.2d at 507. The Court explained its ruling as follows:

> [T]he Rules of Civil Procedure and traditional doctrines of res judicata and collateral estoppel do not apply. To the extent that prior case law implies otherwise, such cases are hereby overruled. While it is true that [the creditor] is barred from proceeding again with non-judicial foreclosure based on the *same default*, [the creditor] may nonetheless proceed with foreclosure by judicial action. [The creditor] may also proceed with non-judicial foreclosure based upon a *different default*.

Id.

The Supreme Court has not yet had occasion to decide whether the ruling in *Lucks* applies in the converse situation where, as here, a clerk enters an unappealed order *allowing* a non-judicial foreclosure to proceed. We find instructive, however, several federal decisions interpreting *Lucks*. For example, *Vicks v. Ocwen Loan Servicing, LLC*, 3:16-cv-00263, 2017 WL 2490007 (W.D.N.C. June 8, 2017) concerned a non-judicial foreclosure action in which the clerk of court entered an order authorizing a creditor to proceed with foreclosure. The borrower

on the note subsequently filed multiple lawsuits "trying to get [the] loan servicer to stop attempting to complete [the] foreclosure action." *Id.* at *1.

The United States District Court for the Western District of North Carolina held that the borrower's attempts to relitigate the validity of the creditor's right to foreclose were barred by the doctrines of collateral estoppel and res judicata. *Id.* at *2. In explaining its reasoning, the court distinguished the facts of the case from *Lucks*:

> Plaintiffs cite to In re Lucks for the proposition that the doctrines of collateral estoppel and res judicata do not apply to non-judicial foreclosure actions. In that case, however, the North Carolina Supreme Court held that the doctrines do not apply in their "traditional" sense in that once the clerk or trial court denies authorization for a foreclosure sale, a creditor may not seek a non-judicial foreclosure based on the *same default*. The creditor may nonetheless proceed with foreclosure by judicial action or proceed with foreclosure based upon a *different default*. Accordingly, contrary to Plaintiff's assertion, In re Lucks did not hold that res judicata and collateral estoppel do not apply to the circumstances presented in this case.

Id. at *2, n. 3 (internal citations and quotation marks omitted).

The United States Bankruptcy Court for the Eastern District of North Carolina reached a similar result in *In re Burgess*, 575 B.R. 330 (Bankr. E.D.N.C. 2017). In *Burgess*, a debtor brought an action alleging that the creditor was not the actual holder of a deed of trust applicable to a portion of the debtor's real property and therefore not entitled to initiate foreclosure proceedings pursuant to the deed of trust. *Id.* at 334. In response, the creditor filed a motion to dismiss the action under the doctrines of res judicata and collateral estoppel, arguing that it had previously obtained an order from the clerk of court authorizing the foreclosure prior to the debtor's filing of a bankruptcy petition. *Id.* at 335.

The bankruptcy court noted its agreement with the ruling in *Vicks* that the Supreme Court's holding in *Lucks* with regard to the applicability of res judicata and collateral estoppel to non-judicial foreclosure proceedings is limited to situations "where the clerk *denied* authorization for a foreclosure sale[,]" *id.* at 343, concluding as follows:

> [Debtor's] claims all rest on whether or not [the creditor] is the valid holder of the Note and Deed of Trust, and that

> those matters were conclusively established by the clerk in entering the foreclosure order. Accordingly, each of the five claims set out in the Complaint are barred by the doctrines of collateral estoppel and res judicata, and accordingly must be dismissed.

Id. at 344.

Although we are, of course, not bound by federal decisions on issues arising under North Carolina law, the analyses in *Vicks* and *Burgess* are both relevant and helpful in deciding this issue. *See Lackey v. N.C. Dep't of Human Res.*, 306 N.C. 231, 236, 293 S.E.2d 171, 175 (1982) ("These federal decisions . . . are not . . . controlling on this court. However, we do deem them to be persuasive authority on the relevant issues." (internal citation omitted)). We find the logic of *Vicks* and *Burgess* to be compelling and agree that *Lucks* simply stands for the proposition that the doctrines of res judicata and collateral estoppel do not apply in situations where foreclosure *was not authorized* by the clerk of court.

Based on our careful reading of *Lucks*, we do not believe the Supreme Court intended for its holding to apply to the opposite situation — that is, where a clerk enters an order *authorizing* foreclosure. Otherwise, without the applicability of res judicata or collateral estoppel in such circumstances, a lender would potentially be forced to relitigate basic issues relating to the validity of the foreclosure that had already been decided in its favor, which would be inimical to the goal of establishing with finality the rights of the parties under these circumstances. Here, because TSC's right to foreclose *was* authorized by the Dare County assistant clerk, we hold that res judicata and collateral estoppel are, in fact, potentially applicable to Plaintiffs' claims. Thus, we possess jurisdiction over this appeal, and Plaintiffs' motion to dismiss the appeal is denied.

II. Application of Collateral Estoppel to Plaintiffs' Claims

[2] We must next determine whether collateral estoppel actually serves to bar Plaintiffs' claims in the present case. "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial . . . proceeding precludes the relitigation of that

issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). Collateral estoppel "precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Id.* (citation omitted).

Pursuant to N.C. Gen. Stat. § 45-21.16(d), the issues to be determined by the clerk in a non-judicial foreclosure proceeding include "the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, [and] (iv) notice to those entitled[.]" *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 422, 775 S.E.2d 1, 6 (2015) (citation and emphasis omitted).

Plaintiffs first contend that they did not receive an adequate opportunity to litigate the issue giving rise to their present complaint at the foreclosure proceeding before the assistant clerk because they were not put on notice that the foreclosure sale would encompass the land upon which Peele's residence was situated. The record shows, however, that Plaintiffs were notified of the date of the foreclosure hearing by means of a notice that was mailed to them on 27 March 2015. This notice contained the description of the property secured by the Deed of Trust upon which TSC intended to foreclose.

Plaintiffs next argue that the claims asserted in their complaint are not barred by collateral estoppel because they "were not brought in — and could not have been brought in — the non-judicial foreclosure proceeding[.]" We find our decision in *Funderburk* to be instructive in addressing their argument. In that case, the creditor initiated non-judicial foreclosure proceedings on eight of the borrowers' properties and "foreclosure hearings were held in which the clerk entered orders authorizing foreclosure sales of all eight properties." *Id.* at 417, 775 S.E.2d at 3. The borrowers later asserted causes of action for, *inter alia*, breach of contract, promissory estoppel, and negligent misrepresentation. *Id.*

On appeal, this Court stated that "the orders of the clerk . . . allowing foreclosure on the eight properties in the prior foreclosure proceedings are conclusive on the issue of default and other issues required to be determined under N.C. Gen. Stat. § 45-21.16, barring relitigation." *Id.* at 423, 775 S.E.2d at 6. We further noted that "a review of the amended complaint shows that all damages alleged by plaintiffs stem from the foreclosures of the properties." *Id.* at 423, 775 S.E.2d at 7. Consequently,

we held that the borrowers' claims were "barred by the final determinations as to the rights of the parties in the foreclosure proceedings." *Id.* *See also Phil Mech. Constr. Co., Inc. v. Haywood*, 72 N.C. App. 318, 322, 325 S.E.2d 1, 3 (1985) ("Since plaintiffs did not perfect an appeal of the order of the Clerk of Superior Court, the clerk's order is binding and plaintiffs are estopped from arguing those same issues in this case.").

We are also guided by our Supreme Court's decision in *In re Michael Weinman Assocs. Gen. P'Ship*, 333 N.C. 221, 424 S.E.2d 385 (1993), which addressed the issue of "whether evidence that property is no longer or should no longer be secured by a deed of trust qualifies as a defense which can be considered by the Clerk in making the four findings required by N.C. Gen. Stat. § 45-21.16(d)." *Id.* at 226, 424 S.E.2d at 388. The Court concluded that "determining which property is legally secured by a deed of trust is a proper issue and element of proof before the Clerk of Superior Court." *Id.* at 228, 424 S.E.2d at 389.

In the present case, Plaintiffs did not appeal the order of the Dare County assistant clerk authorizing foreclosure under the Deed of Trust despite their ability to have done so. Therefore, we are satisfied that Plaintiffs were properly notified of the proceeding and "enjoyed a full and fair opportunity to litigate" the threshold issue of whether TSC was authorized to foreclose pursuant to the Deed of Trust. *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880. As a result, our final inquiry is whether the assistant clerk's resolution of the issues addressed in its order is fatal to the claims Plaintiffs have asserted in their complaint. In making such a determination, we must consider whether any of the claims in Plaintiffs' complaint raise issues that were not conclusively determined by the clerk.

As noted above, Plaintiffs' complaint asserts six claims for relief: (1) a declaration that the foreclosure sale was a nullity; (2) mutual mistake; (3) unjust enrichment; (4) a violation of the Reverse Mortgage Act; (5) breach of fiduciary duty; and (6) unfair and deceptive trade practices.

Plaintiffs' claims seeking a declaratory judgment that the foreclosure is "a nullity" and asserting mutual mistake and unjust enrichment are all premised upon an alleged mistake in the description of the property in the Deed of Trust. As such, these arguments merely constitute a collateral attack on TSC's right to foreclose upon the property under the Deed of Trust. These issues were all previously determined by the clerk in its 16 July 2015 order. Therefore, we hold that Plaintiffs are collaterally estopped from raising these claims in this lawsuit. Plaintiffs' claims for breach of fiduciary duty and unfair and deceptive

trade practices are likewise barred under principles of collateral estoppel because the conduct upon which these causes of action are based is the foreclosure itself.

Finally, we reach the same conclusion with respect to Plaintiffs' claim under the Reverse Mortgage Act. N.C. Gen. Stat. § 53-271(d) provides that "[a] person damaged by a lender's actions may file an action in civil court to recover actual and punitive damages." N.C. Gen. Stat. § 53-271(d) (2017). As noted above, in *Funderburk* this Court held that damages stemming from issues conclusively established in a foreclosure proceeding could not be recovered in a subsequent lawsuit. *See Funderburk*, 241 N.C. App. at 423, 775 S.E.2d at 7. Here, the damages alleged by Plaintiffs with regard to their claim that Defendants violated the Reverse Mortgage Act are based upon the "loss of use and enjoyment of the property, loss of rents, and physical damage to the property . . . by the actions of the defendants[.]" Thus, it is clear that the damages Plaintiffs seek to recover on this claim — as with their other causes of action — flow directly from the foreclosure itself. For this reason, Plaintiffs are collaterally estopped from asserting this claim.

Conclusion

For the reasons stated above, we reverse the trial court's 13 March 2018 order and remand for the entry of an order granting summary judgment in favor of TSC.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Judge INMAN concurs.

Judge BRYANT concurs in the result only.

This opinion was authored by Judge Davis prior to 25 March 2019.

STATE v. LOFTIS

[264 N.C. App. 652 (2019)]

STATE OF NORTH CAROLINA
v.
VIRGINIA LEE LOFTIS

No. COA18-709

Filed 26 March 2019

1. Confessions and Incriminating Statements—incriminating custodial statements—motion to suppress—timeliness—procedural bar—trial court's duty

Where defendant in a methamphetamine case did not bring a timely motion to suppress her incriminating custodial statements, her in-court objection was procedurally barred and the trial court was not required to conduct a hearing on its own motion to ensure that the incriminating statements were knowing and voluntary.

2. Drugs—forensic laboratory report—stipulation to admission—not equivalent to guilty plea

The trial court did not err by admitting a forensic laboratory report, after defendant stipulated to its admission, without first engaging in a personal colloquy with defendant to ensure that she understood the consequences of her stipulation. The stipulation did not amount to an admission of guilt because defendant's theory at trial was that the State had failed to prove that she possessed the methamphetamine found in a mobile home that she and her boyfriend both occupied, so the trial court's colloquy obligation was not triggered.

Appeal by defendant from judgments entered 6 December 2017 by Judge Jeffrey P. Hunt in McDowell County Superior Court. Heard in the Court of Appeals 26 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kevin G. Mahoney, for the State.

Joseph P. Lattimore for defendant.

DIETZ, Judge.

Defendant Virginia Lee Loftis appeals her convictions for trafficking in methamphetamine, possession of methamphetamine, and maintaining a dwelling place for keeping and selling controlled substances. Her

two arguments share a common theme—an effort to shift the responsibility to preserve arguments and build an appellate record away from defense counsel and onto the trial court.

We reject these arguments. Loftis first contends that the trial court erred by failing, on its own initiative, to conduct a voir dire hearing to confirm that Loftis's incriminating in-custody statements to law enforcement were knowing and voluntary. But Loftis did not move to suppress those statements—either before or during trial. Thus, the trial court properly overruled her objection to the admission of those statements without conducting a hearing (which Loftis never requested) because her constitutional challenge to admissibility was procedurally barred.

Loftis next contends that the trial court failed to personally discuss with her the consequences of stipulating to the admissibility of a forensic laboratory report, which waived her right to confront the forensic expert who performed the analysis. As explained below, when a stipulation to the admissibility of evidence is, in effect, a confession of guilt, the trial court must address the defendant directly. But where, as here, the stipulation was not an admission of guilt, and left the defendant free to assert that the State had not met its burden of proof on other grounds, the obligation to inform the defendant of the consequences of waiving Confrontation Clause rights rests with defense counsel. Accordingly, the trial court did not err by accepting the stipulation—made by Loftis's counsel in her presence in open court—without first addressing Loftis directly and discussing the consequences of that stipulation.

Facts and Procedural History

On 7 April 2016, law enforcement executed a search warrant at a mobile home in McDowell County where Defendant Virginia Loftis was present with her boyfriend, Franklin Barlow. An officer placed Loftis in handcuffs and read Loftis her *Miranda* rights.

Officer Shane Vance then asked Loftis where the drugs were in the house and Loftis responded that she would tell him in exchange for a cigarette. Officer Vance gave Loftis a cigarette and she showed officers where to find the drugs. Based on the information from Loftis, officers recovered plastic bags containing a "crystal white substance" from inside a camera bag, along with drug paraphernalia, including plastic baggies and a smoking device. Officers also found a pink diary containing what appeared to be a ledger of drug transactions.

While Loftis was being held in detention following the search, she asked to speak with law enforcement. Lieutenant Chris Taylor and Agent

Jackie Turner responded to her request. The officers again read Loftis her *Miranda* rights. Loftis waived her *Miranda* rights. Loftis then told the officers that the names in the pink diary "were the names of the people that owed her money for methamphetamine." Loftis also described traveling to Asheville to "meet with her source of methamphetamine" and purchasing "at least two to three ounces of methamphetamine every three days."

Law enforcement submitted the seized substance to the SBI laboratory for forensic chemical analysis. An SBI analyst determined that the substances recovered during the search contained methamphetamine and weighed 40.81 grams.

On 18 June 2016, the State indicted Loftis for trafficking in methamphetamine, possession of methamphetamine with intent to sell or deliver, and maintaining a dwelling for keeping and selling methamphetamine. Loftis did not make a pretrial motion to suppress any evidence and her case went to trial on 4 December 2017.

At trial, Loftis's counsel stipulated to the admission of the forensic laboratory report in open court, in Loftis's presence, which meant the State would not need to call the forensic expert who performed the analysis.

On 6 December 2017, the jury convicted Loftis of trafficking in methamphetamine, maintaining a dwelling place for keeping and selling controlled substances, and the lesser-included offense of possession of methamphetamine. The trial court sentenced Loftis to 70 to 93 months in prison and a $50,000 fine for the trafficking charge. The trial court consolidated the two remaining charges and imposed a consecutive sentence of 120 days. Loftis gave oral notice of appeal.

On 7 December 2017, the trial court resentenced Loftis on the two consolidated charges to correct its judgment to reflect that possession of methamphetamine is a Class I felony carrying a sentence of 6 to 17 months in prison. Loftis did not give notice of appeal following resentencing.

Analysis

I. Petition for a Writ of Certiorari

Loftis petitions this Court for a writ of certiorari in connection with this appeal because, although she gave timely notice of appeal after her initial sentencing, she failed to give notice of appeal following her resentencing and the entry of the corrected judgment the following day. This Court has discretion to issue a writ of certiorari to review issues for which the right to appeal was lost by failure to take timely action.

State v. Bishop, __ N.C. App. __, __, 805 S.E.2d 367, 369 (2017). Because Loftis's actions indicate an unmistakable intent to appeal that was lost solely because of the failure to timely act, we exercise our discretion and allow the petition for a writ of certiorari. N.C. R. App. P. 21.

II. Challenge to Admission of Custodial Statements

[1] Loftis first argues that the trial court violated her Fifth, Sixth, and Fourteenth Amendment rights by admitting incriminating custodial statements she made to law enforcement without first conducting a hearing outside the presence of the jury to ensure that Loftis knowingly and voluntarily waived those rights.

Loftis acknowledges that she did not move to suppress the statements at any time in the trial court. Likewise, she acknowledges that she never asked for a hearing from the trial court—her counsel said the word "objection" when the State first asked about those statements and, when the trial court immediately overruled the objection, counsel said nothing more.

Nevertheless, Loftis argues on appeal that the trial judge "abdicated his constitutional duty to ensure that improperly obtained statements do not reach the jury" by failing, on the court's own initiative, to stop the trial, excuse the jury, and conduct a hearing on the voluntariness issue. We reject this argument.

Loftis relies on a series of cases from the early 1970s holding that a defendant's incriminating statements while in custody "when offered by the State as substantive evidence and objected to by defendant are not admissible until after a voir dire hearing in the absence of the jury" where the court addresses the voluntariness issue on the record. *State v. Gregory*, 16 N.C. App. 745, 748, 193 S.E.2d 443, 446 (1972). But this line of cases arose before the Criminal Procedure Act in 1973, which requires these constitutional challenges to be pursued in a timely motion to suppress. *See* N.C. Gen. Stat. § 15A-979(d). Although some of the cases cited by Loftis came after the General Assembly enacted Section 15A-979(d), those cases did not acknowledge the procedural requirement to move to suppress or the language in Section 15A-979(d) making the motion to suppress "the exclusive method of challenging the admissibility" of this type of evidence.

Then, in the early 1980s, this Court again addressed a defendant's argument that the trial court "committed prejudicial error in admitting [an incriminating in-custody] statement without establishing that he understood and waived his constitutional rights." *State v. Conard*, 54

N.C. App. 243, 244, 282 S.E.2d 501, 503 (1981). We held that this argument was procedurally barred because the defendant failed to move to suppress the statement. We explained that "defendant made no motion to suppress, and his general objection was not accompanied by any allegation of a legal basis for suppressing the evidence. It follows therefore that the trial judge had statutory authority to summarily deny defendant's objection." *Id.* at 245, 282 S.E.2d at 503.

Since *Conard*, this Court repeatedly has held that objections to use of a defendant's in-custody statements were procedurally barred because the defendant failed to make a timely motion to suppress. *See*, *e.g.*, *State v. Armstrong*, 165 N.C. App. 544, 600 S.E.2d 899 (2004) (unpublished); *State v. Wilkins*, 203 N.C. App. 741, 693 S.E.2d 281 (2010) (unpublished); *State v. Reavis*, 207 N.C. App. 218, 223, 700 S.E.2d 33, 37 (2010). In *Reavis*, for example, this Court held that a defendant who objected at trial but did not show that "the State failed to disclose the evidence of his interview or statement in a timely manner" had waived this constitutional challenge because the defendant "failed to bring himself within any of the exceptions to the general rule. . . . Thus, defendant's objection at trial to the admissibility of the evidence is without merit because the objection, treated as a motion to suppress, was not timely made." *Id.*

This line of cases is consistent with our Supreme Court's precedent, which also repeatedly has held that these types of constitutional challenges must be brought in a timely motion to suppress. *See*, *e.g.*, *State v. Miller*, __ N.C. __, __, 814 S.E.2d 81, 83 (2018). Here, Loftis did not move to suppress before trial and does not assert on appeal that any exception applied to permit her to move to suppress during trial. "When no exception to making the motion to suppress before trial applies, failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds." *State v. Detter*, 298 N.C. 604, 616, 260 S.E.2d 567, 577 (1979). Accordingly, the trial court properly overruled Loftis's objection as procedurally barred.

III. Stipulated Admission of Forensic Laboratory Report

[2] Loftis next argues that the trial court committed plain error by admitting a forensic laboratory report, after Loftis stipulated to its admission, because the trial court failed to engage in a personal colloquy with Loftis "ensuring that Ms. Loftis personally waived her 6th amendment right to confront the chemist" whose testimony otherwise would be necessary to admit that report.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 516–17, 723 S.E.2d at 333. As explained below, the trial court did not err, and certainly did not plainly err, by admitting the lab report.

This Court has held that "the waiver of Confrontation Clause rights does not require the sort of extensive colloquy needed to waive the right to counsel or enter a guilty plea." *State v. Perez*, __ N.C. App. __, __, 817 S.E.2d 612, 615 (2018). In *Perez*, the defendant and his counsel "signed written stipulations to admit the lab reports without the requirement that they be accompanied by witness testimony." *Id.* Perez argued "that the trial court erred by permitting him to stipulate to the admission of the forensic laboratory reports without engaging in a colloquy to ensure he understood the consequences of that decision." *Id.* at __, 817 S.E.2d at 614. This Court rejected Perez's argument and found no error, expressly declining Perez's "request to impose on the trial courts an obligation to personally address a defendant whose attorney seeks to waive any of his constitutional rights via stipulation with the State." *Id.* We further noted that if a defendant "did not understand the implications of stipulating to the admission of the lab reports at trial, his recourse is to pursue a motion for appropriate relief asserting ineffective assistance of counsel." *Id.* at __, 817 S.E.2d at 615.

Loftis attempts to distinguish *Perez* by arguing that the case involved a written stipulation personally signed by the defendant, while this case involves an oral stipulation by defense counsel made in the defendant's presence. This is a distinction without a difference. The *Perez* holding is based not on the form of the stipulation (oral versus written) but on the subject matter of the stipulation. As this Court has held (in a case, somewhat confusingly, also captioned *State v. Perez*), a stipulation that amounts to a "concession of guilt" requires the trial court to confirm with the defendant that "he had discussed the concession with his counsel and had authorized it, and the defendant thereafter acknowledged that his counsel had made the argument desired by him." *State v. Perez*, 135 N.C. App. 543, 548, 522 S.E.2d 102, 106 (1999). The reason for this rule, as *Perez* explains, is that this type of stipulation during trial "has the same practical effect as a guilty plea, because it deprives the defendant of his right against self-incrimination, the right of confrontation and the right to trial by jury." *Id.* at 547, 522 S.E.2d at 106.

By contrast, in the more recent *Perez* decision, and in this case, the stipulation is to the admissibility of a piece of incriminating evidence that does *not* amount to an admission of guilt. Here, for example, Loftis's central theory of the case was that the State failed to prove she possessed the illegal drugs, which were found in a mobile home occupied by both Loftis and her boyfriend. Thus, stipulating to the admission of the report was not the equivalent of a guilty plea; Loftis continued to present her case and contend, at oral argument, that the State had not met its burden of proof. And, as we observed in *Perez*, there are many strategic reasons why a defendant like Loftis might benefit from stipulating to a forensic report confirming a seized substance was illegal drugs—most obviously to avoid having the State call a credible forensic expert to discuss the testing in detail and potentially distract the jury from the key points of the defense case. *Perez*, __ N.C. App. at __, 817 S.E.2d at 615.

Accordingly, we once again decline to impose on the trial courts a categorical obligation "to personally address a defendant" whose counsel stipulates to admission of a forensic report and corresponding waiver of Confrontation Clause rights. That advice is part of the role of the defendant's counsel. The trial court's obligation to engage in a separate, on-the-record colloquy is triggered only when the stipulation "has the same practical effect as a guilty plea." *Perez*, 135 N.C. App. at 547, 522 S.E.2d at 106. Accordingly, we find no error, and certainly no plain error, in the trial court's admission of the forensic laboratory report upon the oral stipulation of Loftis's counsel, in her presence, in open court.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

Judge Davis concurred in this opinion prior to 25 March 2019.

STATE OF NORTH CAROLINA
v.
MATTHEW CHRISTOPHER NEWSOME, DEFENDANT

No. COA18-707

Filed 26 March 2019

Probation and Parole—probation—revocation—willfully absconding —failure to report and avoidance of supervision

The trial court did not abuse its discretion by revoking defendant's probation for willfully absconding where defendant failed to report within 72 hours of his release from custody (for a violation based on absconding) and thereafter avoided supervision and made his whereabouts unknown for approximately one month. This was not a case of a probationer simply missing scheduled appointments with his probation officer.

Judge DAVIS concurring in the result only.

Appeal by defendant from judgment entered 8 February 2018 by Judge Albert D. Kirby in New Hanover County Superior Court. Heard in the Court of Appeals 28 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien and Assistant Attorney General Amy Bircher, for the State.

Lisa A. Bakale-Wise for defendant-appellant.

BERGER, Judge.

Matthew Christopher Newsome ("Defendant") appeals from a judgment revoking his probation and activating his suspended sentence. On appeal he argues that the trial court abused its discretion when it revoked his probation. We affirm in part and remand in part.

Factual and Procedural Background

On April 15, 2015, Defendant was arrested for felony possession of cocaine and misdemeanor open container of alcohol. Pursuant to a plea arrangement with the State on May 21, 2015, Defendant pleaded guilty to possession of cocaine. The State agreed not to pursue an habitual

felon indictment and dismissed the open container charge. Defendant received a ten to twenty-one month suspended sentence and was placed on probation for eighteen months.

Defendant's probation officers filed multiple violation reports due to Defendant's willful failure to comply with the terms and conditions of his probation. On October 28, 2016, Defendant's probation officer filed a violation report, alleging that Defendant had been charged with driving while impaired on June 11, 2015, and resisting a public officer and intoxicated and disruptive on October 1, 2016. The violation report also alleged that Defendant had failed to pay over $2,000.00 in court-ordered fees. In April 2017, Defendant's probation was modified and extended for an additional twelve months only for his failure to comply with the monetary terms of his probation.

On July 7, 2017, Defendant's probation officer filed a second violation report, alleging that Defendant had absconded by willfully avoiding supervision or willfully making his whereabouts unknown on July 5. The report also alleged that Defendant had refused to make himself available for supervision "after numerous attempts to contact the Defendant at the last known address;" had tested positive for PCP on May 10; had failed to report for office visits as instructed on May 9 and June 6; and had failed to pay his monetary obligation. Defendant was arrested after the July 7 violation report was filed, and he remained in custody until he posted bond on August 30.

Defendant had been instructed to make contact with the probation office within 72 hours of his release from custody. Defendant had failed to contact his probation officer or the probation office after his release from custody. The probation officer had attempted to locate Defendant by calling him and visiting his residence. After observing Defendant enter his residence in September 2017, the probation officer went to Defendant's door, introduced herself as Defendant's probation officer, and spoke with Defendant's mother. Defendant's mother informed the probation officer that Defendant was not at home.

On September 22, 2017, his probation officer filed an Addendum that alleged Defendant had absconded when he failed to report to the probation office within 72 hours of his release from custody on August 30. Defendant testified at his probation hearing that he did in fact go to the probation office as instructed and that he was not the person the probation officer had seen enter his residence. However, the trial court found that Defendant's testimony was not credible. In fact, the trial court found that "there is such a disparity – in the testimony – I mean,

it's almost – almost – you're reciting something that's complete opposite from what [the probation officer] testified to."

On February 8, 2018, the trial court found that Defendant had willfully violated the terms and conditions of his probation set forth in both the July 7 and September 22, 2017 violation reports, and that Defendant's probation could be revoked pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a) for willfully absconding. The trial court activated Defendant's suspended sentence.

Defendant appeals, but failed to comply with the requirements of Rule 4 of the Rules of Appellate Procedure. Defendant filed a petition for writ of certiorari to address his defective notice of appeal. In our discretion, we grant certiorari and review the merits of his appeal.

Standard of Review

On appeal, Defendant argues that the trial court abused its discretion when it revoked Defendant's probation. We disagree.

"[I]n a probation revocation, the standard is that the evidence be such as to reasonably satisfy the [trial court] in the exercise of [its] sound discretion that the defendant has willfully violated a valid condition [upon which probation can be revoked]." *State v. Harris*, 361 N.C. 400, 404, 646 S.E.2d 526, 529 (2007) (citation and quotation marks omitted). We review a trial court's decision to revoke a defendant's probation for an abuse of discretion. *State v. Miller*, 205 N.C. App. 291, 293, 695 S.E.2d 149, 150 (2010) (citation omitted). Abuse of discretion "occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (citation and quotation marks omitted).

Analysis

"Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *State v. Murchison*, 367 N.C. 461, 463, 758 S.E.2d 356, 358 (2014) (citations and quotation marks omitted). "A probation revocation proceeding is not a formal criminal prosecution," and an "alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* at 464, 758 S.E.2d at 358 (citations and quotation marks omitted).

A trial court "may only revoke probation for [committing a criminal offense] or [absconding], except as provided in G.S. 15A-1344(d2)." N.C. Gen. Stat. § 15A-1344(a) (2017). A probationer absconds when he

willfully avoids supervision or willfully makes his whereabouts unknown to his probation officer. N.C. Gen. Stat. § 15A-1343(b)(3a) (2017). It is a "defendant's responsibility to keep his probation officer apprised of his whereabouts." *State v. Trent*, ___ N.C. App. ___, ___, 803 S.E.2d 224, 232 (2017), *review denied*, 370 N.C. 576, 809 S.E.2d 599 (2018).

Merely failing to report for an office visit,

> does not, *without more*, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these exact actions violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence. . . .
>
> To hold otherwise would render portions of N.C. Gen. Stat. § 15A-1344(a) superfluous. Allowing actions which explicitly violate a regular or special condition of probation other than those found in N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) to also serve, *without the State showing more*, as a violation of N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) would result in revocation of probation without following the mechanism the General Assembly expressly provided in N.C. Gen. Stat. § 15A-1344(d2).

State v. Johnson, 246 N.C. App. 139, 146, 783 S.E.2d 21, 26 (2016) (emphasis added). "[O]nce the State present[s] competent evidence establishing defendant's failure to comply with the terms of his probation, the burden [is] on *defendant* to demonstrate through competent evidence his inability to comply with those terms." *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 231.

In the present case, the second violation report was filed against Defendant for absconding, testing positive for PCP, failing to report for two office visits, and failing to comply with certain monetary conditions. The allegation regarding absconding specifically states that Defendant willfully violated the

> Regular Condition of Probation General Statue 15A-1343(b)(3a) 'Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer[']' in that, on or about 7/5/2017, and after numerous attempts to contact the Defendant at the last known address . . . the said Defendant has refused to make himself available for

> supervision as instructed by the probation officer, thereby absconding probation supervision.

Defendant was subsequently served with the violation report and taken into custody. Defendant knew or should have known upon being served with the violation report that he was considered to be an absconder by his probation officer.

Upon his release from custody on August 30, 2017, Defendant was then instructed to make contact with his probation officer within 72 hours of his release. This was more than a regular office visit. It was a special requirement imposed upon Defendant because he was considered to be an absconder, and it was his "responsibility to keep his probation officer apprised of his whereabouts." *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 232.

While in custody, the probation officer knew Defendant's whereabouts and how to contact him. Once Defendant had posted bond, Defendant never made his probation officer aware of his whereabouts as instructed. The requirement for Defendant to contact the probation officer within 72 hours of release from custody alerted Defendant that his probation officer was attempting to actively monitor him. Had Defendant complied, he would have enabled the probation officer to attempt appropriate monitoring of Defendant.

However, because Defendant failed to contact his probation officer or the probation office after his release from custody, the probation officer was forced to locate Defendant. She then made multiple phone calls to Defendant's phone number that were not returned. When she had finally tracked him down and observed him enter his residence, she was informed by Defendant's mother that he was not there.

On September 22, 2017, Defendant's probation officer filed an Addendum to the July 7 violation report because Defendant had failed to report to his probation officer or the probation office upon his release from custody, failed to contact his probation officer or the probation office for nearly one month, and willfully made his whereabouts unknown to his probation officer. The probation officer alleged in the Addendum that Defendant violated a

> Regular Condition of Probation General Statue 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, on or about 08-30-2017, the offender bonded out

> of custody, offender is a returned absconder[.] Offender failed to report the probation office within 72 hours of release, and has made no contact attempts despite several attempts to contact the offender, his whereabouts remain unknown[.] The offender is actively avoiding supervision, thereby absconding.

The State presented sufficient evidence that Defendant willfully absconded by failing to report within 72 hours of his release from custody and thereafter avoiding supervision and making his whereabouts unknown from August 20 through the filing of the violation report on September 22.

The burden was then on Defendant to "demonstrate through competent evidence his inability to comply with these terms" of his probation upon release from custody. *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 231. Defendant admitted during the hearing that he knew he had to report to the probation office within 72 hours of his release, that his mother had informed him that a probation officer had stopped by their home, and that his mother had given him a business card with a probation officer's information on it. Moreover, the trial court determined that Defendant was not credible. In fact, the trial court went as far as to find that the evidence offered by Defendant was completely opposite of the testimony provided by the probation officer.

Defendant, however, argues that the trial court abused its discretion because missing scheduled appointments cannot constitute absconding pursuant to *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015) and *State v. Krider*, ___ N.C. App. ___, 810 S.E.2d 828 (2018), *aff'd in part per curiam*, ___ N.C. ___, 818 S.E.2d 102 (2018). Here, however, Defendant did not simply miss an appointment or phone call with his probation officer. Defendant had willfully failed to comply with probation leading up to the July 7 violation report by making himself unavailable for supervision "after numerous attempts to contact Defendant at the last known address," and then again for almost one month following his release from custody on August 30.

In *Williams*, the allegations in the violation report that the probationer had failed to remain within the jurisdiction and had failed to report for regular office visits could not be bootstrapped into a finding of absconding. *Williams*, 243 N.C. App. at 200, 776 S.E.2d at 743. In *Williams*, this Court specifically noted that "the State does not argue that Defendant absconded" in its brief and the violation "report did not include reference to N.C. Gen. Stat. § 15A-1343(b)(3a)." *Id.* at 200, 205,

776 S.E.2d at 743, 745. Similarly, this Court in *Krider* stated that evidence of Section 15A-1343(b)(2) and (3) violations could not be considered absconding, and, as in *Williams*, the violation report in *Krider* had not referenced Section 15A-1343(b)(3a). *Krider*, ___ N.C. App. at ___, 810 S.E.2d at 831.

Here, however, the violation report and Addendum specifically alleged that Defendant had violated Section 15A-1343(b)(3a) by failing to make himself available for supervision and actively avoiding supervision. Defendant had not simply missed appointments or phone calls. After he was taken into custody for a violation based on absconding, Defendant had knowingly failed to notify his probation officer of his release from custody. Thereafter, Defendant actively avoided supervision each day after the initial 72-hour time period through and until September 22, 2017. This was a willful course of conduct by Defendant that thwarted supervision. Defendant's actions were a persistent avoidance of supervision and a continual effort to make his whereabouts unknown.

Because the trial court had not abused its discretion when it found Defendant had absconded, we affirm the revocation of Defendant's probation and activation of the suspended sentence.

However, we remand this matter for correction of a clerical error in the trial court's judgment. "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted). As stated above, a trial court "may only revoke probation for [committing a criminal offense] or [absconding]." N.C. Gen. Stat. § 15A-1344(a). Thus, the judgment form must clearly indicate that probation was revoked because Defendant had committed a criminal offense or absconded. When the trial court incorrectly checks a box on a judgment form that contradicts its findings and the mistake is supported by the evidence in the record, we may remand for correction of this clerical error in the judgment. *See State v. Jones*, 225 N.C. App. 181, 186, 736 S.E.2d 634, 638 (2013) (affirming the trial court's revocation of defendant's probation, but remanding for the sole purpose of correcting a clerical error on the judgment form).

Here, the trial court found on Defendant's judgment form that Defendant had violated the conditions of probation as set forth in paragraphs 1 through 5 of the July 7, 2017 violation report, and paragraph 1

of the September 22, 2017 Addendum. The trial court had checked the box indicating that Defendant's probation could only be revoked for committing a criminal offense or absconding. However, because violations 2 through 5 in the July 7, 2017 violation report are neither criminal offenses nor do they constitute absconding, the trial court should not have selected the box that "[e]ach violation is in and of itself was sufficient basis upon which this Court should revoke probation and activate the suspended sentence." Accordingly, we remand to the trial court to correct this clerical error on the judgment.

Conclusion

For the reasons stated above, we affirm the trial court's judgment. However, we remand for the limited purpose of correcting the clerical error described above.

AFFIRMED IN PART; REMANDED IN PART.

Judge HUNTER, JR. concurs.

Judge DAVIS concurred in result only in this opinion prior to 25 March 2019.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 26 MARCH 2019)

BALL v. BAYADA HOME HEALTH CARE No. 18-918	N.C. Industrial Commission (X48418) (X92876)	Affirmed
CLAUDIO v. SELLERS No. 18-636	Wake (16CVS7491)	Reversed and Remanded
CLIFTON v. GOODYEAR TIRE & RUBBER CO. No. 18-987	N.C. Industrial Commission (X62826)	Affirmed
HALIFAX CTY. v. EMPIRE FOODS, INC. No. 18-531	Halifax (15CVS752)	Affirmed
IN RE A.A.J. No. 18-697	Buncombe (15JA278)	Affirmed
IN RE J.C.-B. No. 18-922	Wayne (17JA62) (18CVD1105)	Vacated and Remanded
IN RE K.A.G. No. 18-829	Guilford (16JT521-522)	Affirmed
RMAH v. USAA CAS. INS. CO. No. 18-623	Wake (16CVD2057)	AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.
STATE v. FRANKLIN No. 18-777	Gaston (15CRS62832)	Vacated
STATE v. GIBSON No. 18-448	Vance (14CRS50497)	Dismissed
STATE v. HOLMES No. 18-1023	Onslow (12CRS55550) (14CRS54860) (14CRS54862-63) (14CRS54866-67)	Vacated and Remanded

STATE v. HOWARD No. 18-660	Wake (16CRS221930)	VACATED IN PART AND REMANDED WITH INSTRUCTIONS.
STATE v. THOMAS No. 18-959	Forsyth (16CRS2455) (16CRS59699) (16CRS59700)	NO PLAIN ERROR.

BRADSHAW v. BRADSHAW

[264 N.C. App. 669 (2019)]

DEBORAH C. BRADSHAW, PLAINTIFF
v.
RONALD D. BRADSHAW, DEFENDANT

No. COA18-432

Filed 2 April 2019

Divorce—separation agreement—out-of-state—effect of reconciliation on enforceability—public policy—severability of separation and property settlement provisions

The reconciliation provision in a Virginia separation agreement—which provided that the agreement's property settlement provisions (including waivers by both parties to any rights of equitable distribution or spousal support) would continue in full force and effect if the parties resumed their marital relationship—did not violate North Carolina public policy and therefore remained enforceable after the parties reconciled and separated a second time. Applying Virginia law—under which separation agreements must be interpreted as contracts—the plain language of the agreement controlled, and the inclusion of a severability provision served to keep intact the property settlement provisions even if the reconciliation provision were to be invalidated.

Appeal by defendant from declaratory judgment entered 6 February 2018 by Judge Meader W. Harriss, III, in District Court, Camden County. Heard in the Court of Appeals 17 October 2018.

Shilling, Pass & Barlow, by Andrew T. Shilling, and The Twiford Law Firm, by Lauren Arizaga-Womble, for plaintiff-appellee.

Ward and Smith, P.A., by John M. Martin; and Darlene Gill Chambers, P.C., Attorney at Law, by Darlene Gill Chambers, for defendant-appellant.

STROUD, Judge.

Defendant-husband appeals from a declaratory judgment rendering void for public policy reasons a 1993 Virginia separation agreement and property settlement agreement. The parties reconciled after signing the agreement, moved to North Carolina, and separated again in 2013. North Carolina's public policy allows property settlement agreements to

survive reconciliation, so the Virginia Agreement is enforceable in North Carolina. We reverse the trial court's order and remand.

I. Background

Husband and Wife married in 1987 in Virginia and separated in 1991. In October 1993, the parties entered into a *Stipulation and Agreement* in Virginia governed by Virginia law ("the Agreement"). The Agreement was a comprehensive agreement with provisions addressing separation, spousal support, and property division. As relevant to this appeal, the Agreement made "full and complete settlement of all property rights between them and their right to equitable distribution pursuant to Virginia Code Annotated §20-107.3" and provided that "from the time of execution of this Agreement neither Husband nor Wife shall have any interest of any kind or nature whatsoever in or to any of the marital property of the parties or the property of the other except as provided in this Agreement and Stipulation." The parties waived "any and all rights to equitable distribution or any monetary award pursuant to Virginia Code Annotated §20-107.3." The Agreement divided the parties' property and also provided that "each party hereafter may own, have and enjoy, independently of any claim or right of the other party, all items of real and personal property *now or hereafter belonging to him or her[.]*" (Emphasis added.) Each party "forever waive[d], now and forever" any rights to "spousal support and maintenance or alimony" (original in all caps) from the other, except that Husband agreed to "immediately pay directly to Wife the sum of $25,000.00" as a "one time lump sum spousal support payment."

The reconciliation provision of the Agreement is the primary subject of the issues on appeal:

> RECONCILIATION
>
> 20. In the event of reconciliation and resumption of the marital relationship between the parties, the provisions of this Agreement for settlement of property rights, spousal support, debt payments and all other provisions shall nevertheless continue in full force and effect without abatement of any term or provisions hereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of the reconciliation.

In 1994, the parties reconciled, and, in 1997, they moved to North Carolina. In 2013, the parties separated for the second time. They never entered into any written agreement modifying or revoking the Agreement.

On 30 January 2017, Wife filed a complaint seeking absolute divorce and equitable distribution, but not postseparation support or alimony. Husband filed an answer admitting the allegations relevant to absolute divorce but denying those relevant to equitable distribution, and he counterclaimed for a declaratory judgment that the Agreement "remains in full force and effect" and bars Wife's claim for equitable distribution. Regarding the Agreement, Husband alleged:

> 6. On October 19, 1993, the parties entered into a *Stipulation and Agreement* ***(Attached as Exhibit A)*** which in pertinent part:
>
> a. provided for the distribution between the parties of all marital and separate property of the parties
>
> b. accepted the division as fair and reasonable and waived equitable distribution, postseparation support, and alimony claims
>
> c. stated that in the event of reconciliation this settlement shall continue in full force and effect unless decided otherwise and by a new written agreement formally entered
>
> d. at the time the parties executed said *Agreement* Defendant paid Plaintiff the required $25,000 lump sum postseparation support payment and each party initialed the amount paid[.]

Wife replied to Husband's counterclaim and admitted the allegations of Paragraph 6 "to the extent that the parties entered into a Separation Agreement on October 19, 1993." She responded to the sub-parts of Paragraph 6, admitting that "the Separation Agreement provided for the distribution of all marital and separate property between the parties owned at the time of the Agreement" but alleging that the Agreement did not apply to "property acquired after the date of reconciliation, including active appreciation of the Defendant's separate property . . . ." Wife also admitted that Husband had paid her the $25,000.00 lump sum postseparation support payment. Wife also cross-claimed for a declaratory judgment that "the Separation Agreement entered into between the parties on October 19, 1993, does not bar future claims of equitable distribution and spousal support after reconciliation of the parties." She alleged that

> 11. The Defendant through counsel is alleging that the property acquired after the date of reconciliation is not marital property and the Separation Agreement

> applies to after reconciliation acquired property which is contrary to our Equitable Distribution Statutes.
>
> 12. The Plaintiff's position, supported by the law of this state, that the separation agreement divided the property that was in the parties' possession at the time of the entry of the agreement and that at any property acquired after date of reconciliation, including active appreciation, is subject to equitable distribution.

Wife filed a motion to sever the equitable distribution claim from the absolute divorce claim, which was granted by the trial court. The trial court granted Wife's motion for summary judgment for absolute divorce and reserved the pending claims for equitable distribution and declaratory judgment. The material facts were not in dispute before the trial court, and the declaratory judgment claims presented only the legal question of the enforceability of the Agreement. The trial court requested the parties to submit briefs addressing these issues:

> (1) Whether the Stipulation and Agreement is still valid and enforceable under Virginia Law; if yes, then:
>
> (2) Whether paragraph 20 of the Stipulation and Agreement titled "Reconciliation" violates North Carolina Public Policy; if no, then:
>
> (3) Whether the Stipulation and Agreement completely bars further Equitable Distribution under Virginia law.

After considering the arguments presented by both parties in their briefs, the trial court concluded in relevant part that: (1) the Agreement is valid under Virginia law; (2) application of Virginia law would be contrary to North Carolina's public policy; (3) the Agreement's reconciliation provision violates North Carolina public policy; and, (4) the Agreement does not apply to Wife's claim for equitable distribution. Upon motion by Husband, the trial court certified the declaratory judgment for immediate appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b), and Husband timely appealed.

II. Standard of Review

The material facts are not contested, and the order on appeal presents only questions of law.[1]

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1. Although Husband's brief challenges several paragraphs of the order labeled as "findings of fact" as "not supported by competent evidence," the findings are actually conclusions of law, and we will review them accordingly.

> "In a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal. We review the trial court's conclusions of law *de novo*." We will therefore review the order's legal conclusion of the enforceability of the agreement *de novo*.

Raymond v. Raymond, ___ N.C. App. ___, ___, 811 S.E.2d 168, 174 (2018) (citation and brackets omitted).

III. Choice of Law

The parties lived in Virginia in 1993 when they executed the Agreement, and the Agreement contained a choice of law provision:

> APPLICABLE LAW
>
> 17. This Agreement shall be construed and governed in accordance with the laws of the Commonwealth of Virginia[.]

The parties essentially agree that Virginia law governs the validity and interpretation of the Agreement, although Wife argues that the "Agreement is neither valid nor enforceable under Virginia law[,]" because North Carolina and Virginia law agree that "a choice of law provision in a contract will not be honored if the substantive law of the selected jurisdiction is contrary to the established public policy of the state where the contract is to be enforced." Thus, Wife concludes, "because enforcement of the Agreement in North Carolina is contrary to the established public policy of North Carolina, Virginia law will not permit the Agreement to be enforced here." But the question is not as complicated as Wife contends.

> The general rule is that things done in one sovereignty in pursuance of the laws of that sovereignty are regarded as valid and binding everywhere. North Carolina has long adhered to the general rule that *lex loci contractus*, the law of the place where the contract is executed governs the validity of the contract. . . . However, foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum.

Muchmore v. Trask, 192 N.C. App. 635, 639-40, 666 S.E.2d 667, 669-70 (2008) (citations, ellipsis, brackets, and quotation marks omitted).

Virginia law governs the validity of the Agreement, which was the first question addressed in the briefs before the trial court. Virginia law also controls the interpretation of the Agreement, but the Agreement is enforceable in North Carolina only if it is not "opposed to the settled public policy" of this State. *Id.* at 640, 666 S.E.2d at 670.

IV. Public Policy

Although Husband's brief breaks the questions presented by this appeal into various issues, there is only one question of law presented: whether the Agreement is unenforceable because the reconciliation provision is against the public policy of North Carolina. The trial court concluded that "[t]he agreement is valid under Virginia law." In addition to addressing the public policy issue, Wife argues that "[t]he Agreement is neither valid nor enforceable under Virginia law." But the *validity* of the Agreement under Virginia law is not at issue in this appeal. Husband did not challenge the trial court's conclusion that the Agreement was valid under Virginia law, and Wife has not cross-appealed. *See McLeod v. Wal-Mart Stores, Inc.*, 208 N.C. App. 555, 562, 703 S.E.2d 471, 476 (2010) (finding failure to cross-appeal to preclude this Court from considering one of plaintiff's arguments). In addition, Wife has never denied that the Agreement was a valid and enforceable agreement under Virginia law in 1993 when it was executed, and her own pleadings acknowledge as much.[2] Therefore, whether this Agreement is valid under Virginia law is not before this Court, and we need consider only whether the Agreement is "opposed to the settled public policy of [North Carolina]." *Muchmore*, 192 N.C. App. at 640, 666 S.E.2d at 670.

The trial court's order made the following findings of fact:

> 15. The Agreement contemplated the parties would forever live separate and apart due to the "irreconcilability of their differences."
>
> 16. The Agreement is integrated in that the separation of the parties was reciprocal consideration for the property provisions.

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2. Wife's pleadings below also did not raise the issue of unenforceability based upon violation of North Carolina's public policy or the validity of the Agreement, but instead alleged that the Agreement did not apply to property acquired after the reconciliation of the parties. Her defense in her answer was based upon interpretation of the Agreement. But when the trial court heard the declaratory judgment claims, both parties addressed the public policy argument, and Wife abandoned her contention based upon her interpretation of the Agreement as not applying to property acquired after the date of the Agreement.

17. The Reconciliation provision contained in Paragraph 20 is void as it violates North Carolina public policy in that separation and property settlement agreements are void unless the parties are living apart. Reconciliation voids the entire agreement. *Stegall v. Stegall*, 100 N.C. App. 398 (1990).

18. The Reconciliation provision contained in Paragraph 20 is void as it violates public policy in that it discourages the reconciliation of the marital relationship. *Patterson v. Patterson*, 774 S.E.2d 860 (2015).

19. The terms of the Agreement are void. *Stegall v. Stegall*, 100 N.C. App. 398 (1990), *Morrison v. Morrison*, 102 N.C. App. 514, (1991).

20. The choice of law provision with the Agreement states, "This Agreement shall be construed with the law of the Commonwealth of Virginia."

21. Application of Virginia law would be contrary to the established public policy of North Carolina and should not be applied.

22. The agreement is valid under Virginia law in the Commonwealth of Virginia recognizes that Separation and Property Settlement Agreements can remain intact even upon reconciliation of the parties.

. . . .

24. The Agreement has no application to Plaintiff's claim for Equitable Distribution.

The trial court went on to conclude that "[a]pplication of Virginia law would be contrary to the established public policy of North Carolina[,]" and decreed that the Agreement "is an integrated agreement and the Reconciliation provision in paragraph 20 providing for survival past reconciliation is void as it violates North Carolina Public Policy, and is not binding in the State of North Carolina." Husband challenges findings of fact 15 through 19, 21, and 24, and conclusion of law 3 which is identical to finding of fact 21.

Only finding 15 could be considered as a finding of fact, and it is supported by the evidence as it is based upon the language of the Agreement: "WHEREAS, marital difficulties have arisen between the parties, and the parties are now and have been separated, living separate and apart, with

no possible chance of reconciliation since May 24, 1991[.]" The remainder of the "findings" are actually conclusions of law, and we therefore review the challenged "findings" *de novo*. *See Barnette v. Lowe's Home Ctrs., Inc.*, 247 N.C. App. 1, 6, 785 S.E.2d 161, 165 (2016) ("Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review.").

Husband argues that the trial court erred by holding the Agreement is void under North Carolina's public policy. Wife argues that the Agreement was an integrated separation agreement and property settlement agreement, and since it would violate North Carolina's public policy if reconciliation did not void the separation provisions of the Agreement, the reconciliation provision is also unenforceable; since the separation provisions were reciprocal consideration for the property settlement provisions, the entire Agreement is then void. The trial court agreed with Wife that the Agreement was an integrated agreement, based upon the language of the preamble, finding as follows:

> 14. The First Paragraph of Page 3 of the Agreement specifically states
>
> "NOW, THEREFORE, for and in consideration of the promises and in consideration of the mutual covenants and agreements hereinafter contained, and other good and valuable consideration deemed adequate and sufficient at law . . . without in any way attempting to facilitate divorce or separation, but rather in recognition of the prior existing separation of the parties, the irreconcilability of their differences, and in order to determine finally and settle their property rights . . . the parties do hereby covenant and agree as follows:
>
> SEPARATE LIVES
>
> 1. The parties hereafter shall live separate and apart from each other . . . ."

We first note that the parties' briefs rely primarily upon North Carolina law for the distinction between a property settlement agreement and a pure separation agreement how to determine if an agreement with both types of provisions is an integrated agreement. *See Morrison v. Morrison*, 102 N.C. App. 514, 519, 402 S.E.2d 855, 858 (1991) ("Whether the executory provisions of a property settlement agreement are rescinded upon resumption of marital relations depends on whether the property settlement is negotiated in reciprocal consideration for the separation agreement. This is so whether the

property settlement and the separation agreement are contained in a single document or separate documents. If the property settlement is negotiated as reciprocal consideration for the separation agreement, the agreements are deemed integrated and the resumption of marital relations will terminate the executory provisions of the property settlement agreement. If not in reciprocal consideration, the provisions of the property settlement are deemed separate and the resumption of marital relations will not affect either the executed or executory provisions of the property settlement agreement." (quotation marks omitted)). But in accord with the choice of law provision of the Agreement, we must interpret the Agreement under Virginia law, and Virginia law does not have case law addressing the concepts of "integrated" separation and property settlement agreements in exactly the same way as North Carolina. Under Virginia law, we must interpret the Agreement as a contract:

> Property settlement agreements are contracts; therefore, we must apply the same rules of interpretation applicable to contracts generally. We state at the outset our belief that the property settlement agreement is unambiguous; thus, its meaning and effect are questions of law to be determined by the court. On review we are not bound by the trial court's construction of the contract provisions here in issue.
>
> In construing contracts, ordinary words are to be given their ordinary meaning. The Supreme Court of Virginia restated the applicable principles in *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983):
>
> > We adhere to the plain meaning rule in Virginia: Where an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself. This is so because the writing is the repository of the final agreement of the parties.
> >
> > The court must give effect to all of the language of a contract if its parts can be read together without conflict. Where possible, meaning must be given to every clause. The contract must be read as a single document. Its meaning is to be gathered from all its associated parts assembled as the unitary expression of the agreement of the parties. However inartfully it may have been drawn, the court cannot make a new contract for the parties, but must construe its language as written.

Tiffany v. Tiffany, 332 S.E.2d 796, 799 (Va. Ct. App. 1985) (citations, quotation marks, brackets, ellipsis and parentheticals omitted).

The trial court's order focused on the language of the Preamble, as quoted above in finding 14. But the Agreement includes other relevant provisions which must be given effect "if its parts can be read together without conflict." *Id*. The Agreement includes specific provisions regarding severability of invalid provisions:

SEVERABILITY OF PROVISIONS

> 12. If any provision of this Agreement shall be deemed by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall remain in full force and effect.

Under Virginia law, we must give "meaning . . . to every clause. The contract must be read as a single document." *Id*. The trial court's order focused on general language from the Preamble but ignored the far more specific provision of severability. The Preamble simply states the consideration for the Agreement and even notes that the Agreement is not "in any way attempting to facilitate divorce or separation[.]" The Preamble language in finding 14 and the Severability provision are not in conflict. Even if the reconciliation provision is "invalid" because it is against North Carolina public policy as applied to the "pure separation" provisions of the Agreement, the remainder of the Agreement regarding property settlement is still enforceable, according to the Severability of Provisions language in the Agreement. And even under North Carolina law—which the trial court used instead of Virginia law—the agreement to separate was not "reciprocal consideration" for the property settlement, since the Agreement has a specific provision that the Agreement's provisions are severable. *See Hayes v. Hayes*, 100 N.C. App. 138, 147, 394 S.E.2d 675, 680 (1990) ("[W]here the parties include unequivocal integration or non-integration clauses in the agreement, this language governs.").

After *de novo* review of the challenged conclusions of law, including the cases cited by the trial court to support its conclusions, the conclusions are not supported by law. The trial court's order included references to several specific cases, so we will address those. We first note that the parties were separated when they signed the Agreement, so the Agreement would not violate North Carolina's public policy as to entering into a separation agreement without physical separation, which is one of the issues discussed in *Stegall*, 100 N.C. App. 398, 403, 397 S.E.2d 306, 309 (1990), and cited as support for finding 17. In finding 17, the trial court concluded that "[t]he Reconciliation provision contained in

Paragraph 20 is void as it violates North Carolina public policy in that separation and property settlement agreements are void unless the parties are living apart. Reconciliation voids the entire agreement. *Stegall v. Stegall*, 100 N.C. App. 398 (1990)." But *Stegall* does not hold that *reconciliation* necessarily voids a property settlement agreement, and it does not address the effect of a reconciliation provision in an agreement at all, since the agreement in *Stegall* did not have this provision. *See id.* at 411, 397 S.E.2d at 313.

The relevance of the second case noted in the findings is also unclear. In *Patterson*, this Court held that the alimony provisions of a separation agreement which did not provide for termination of alimony payments upon the wife's cohabitation were not against public policy and were enforceable. 242 N.C. App. 114, 774 S.E.2d 860 (2015). Although N.C. Gen. Stat. § 50-16.9 provides for termination of *court-ordered* alimony upon cohabitation by the dependent spouse, parties are free to enter into a contract providing otherwise. *Patterson* notes that a provision is against public policy only if the agreement by its own terms promotes an objection against public policy:

> Moreover, as this Court pointed out in *Sethness*, the clear implication of cases where separation agreements were found to be void as against public policy and N.C. Gen. Stat. § 52-10.1 is that such agreements may not by their own terms promote objectives (i.e.: divorce, termination of parental rights) which are offensive to public policy.

Patterson, 242 N.C. App. at 118, 774 S.E.2d at 862-63 (brackets, ellipsis, and quotation marks omitted).

The trial court cites to *Morrison v. Morrison*, 102 N.C. App. 514, 402 S.E.2d 855, in finding 19, and concluded, "The terms of the Agreement are void." The primary focus of *Morrison* is the distinction between a separation agreement and a property settlement agreement, and where an agreement includes both types of provisions, how to determine if the agreement is integrated. *Id.* As noted above, we must construe the Agreement under Virginia law, but as to North Carolina's public policy, *Morrison* also notes that reconciliation provisions in agreements with provisions regarding both separation and property rights are *not* against public policy:

> We therefore reject the suggestion that all agreements, whether in one document or two, relating to support and property rights are reciprocal as a matter of law. To so hold would prohibit the parties from entering

> into contracts which do not violate law or public policy. *Because contracts providing that a reconciliation will not affect the terms of a property settlement are not contrary to law or public policy, adopting the rule that all agreements relating to support and property rights are reciprocal as a matter of law would impermissibly interfere with the parties' freedom of contract rights.* On the other hand, contracts which provide that reconciliation will not affect the terms of a separation agreement violate the policy behind separation agreements and are therefore void.

Id. at 519–20, 402 S.E.2d at 858-59 (emphasis added) (citations omitted).

In *Porter v. Porter*, this Court analyzed a North Carolina separation agreement that contained a reconciliation provision similar to the one at issue in the Agreement:

> 13. In the event of the reconciliation and resumption of the marital relationship between the parties, the provisions of this agreement for settlement of property rights shall nevertheless continue in full force and effect without abatement of any term or provision thereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of reconciliation.

> Thus, according to the express terms of the Agreement, and with full information as to the legal rights of equitable distribution and distributive award contained in North Carolina General Statute Section 50 20, husband and wife agreed that each would relinquish any and all claims to any and all real or personal property owned by the other party or that said party may hereafter own. In other words, the parties exercised the broad contractual freedom afforded them under North Carolina law by entering into their 1988 Agreement and foregoing their right to seek equitable distribution of the marital estate. Additionally, the parties specifically contemplated and agreed that, were they to reconcile and resume the marital relationship after entering into the Agreement in 1988, the provisions of the Agreement regarding settlement of property rights shall continue in full force and effect without abatement of any

> term or provision thereof. Thus, the Agreement makes the parties' intent clear that the provisions regarding ownership of property acquired after husband and wife entered into the 1988 Agreement were to remain unaffected by any later reconciliation and resumption of the marital relationship. Accordingly, we conclude that the trial court erred by ordering equitable distribution of the property in contravention of the express terms of the now-court-ordered Agreement. Therefore, we vacate the trial court's order for equitable distribution and remand with instructions to distribute the property in accordance with the terms of the parties' Agreement, which provided that any property not specifically provided for under this Agreement shall be deemed to be separate property to be solely owned by the party holding title to the same.

Porter v. Porter, 217 N.C. App. 629, 633-34, 720 S.E.2d 778, 780-81 (2011) (citations, quotation marks, brackets, and ellipsis omitted).

Here, even the reconciliation provision of the Agreement would offend North Carolina's public policy if applied to the "pure separation" provisions of the Agreement; the "pure separation" provisions were not reciprocal consideration for the property settlement provisions. The parties agreed that the provisions of the Agreement are severable, and enforcement of the property settlement provisions of the Agreement does not conflict with North Carolina's public policy. Therefore, the trial court's finding and conclusion stating that "[a]pplication of Virginia law would be contrary to the established public policy of North Carolina and should not be applied" is in error.

V. Conclusion

The reconciliation provision of the Agreement does not violate North Carolina's public policy as applied to the property settlement provisions of the Agreement. Both parties waived any rights to equitable distribution in the Agreement, so the trial court erred by concluding that Wife's equitable distribution claim is not affected by the Agreement. We reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges DILLON and BERGER concur.

DENNIS T. BROWN AND RAQUEL HERNANDEZ, PLAINTIFFS
v.
LATTIMORE LIVING TRUST DATED AUGUST 3, 2011, BY AND THROUGH ITS TRUSTEES, WILLIAM TIMOTHY LATTIMORE AND PAX MILLER LATTIMORE; AND PROLAND DEVELOPMENT, INC., DEFENDANTS

No. COA18-941

Filed 2 April 2019

1. Statutes of Limitation and Repose—trespass—damage to adjacent property—promise to repair and partial performance—no tolling of limitations period

In a dispute between adjacent landowners, where defendants allegedly damaged plaintiffs' property while installing a brick wall and metal fence along the dividing property line, plaintiffs' trespass claim was untimely because they filed their complaint more than three years after the original trespass (N.C.G.S. § 1-52(3)) and because neither defendants' promises to repair the damage nor their partial performance on that promise tolled the limitations period.

2. Statutes of Limitation and Repose—breach of contract—identifying when the claim accrued—identifying time of breach

In a dispute between adjacent landowners, where defendants allegedly breached their promise to restore plaintiffs' damaged property, the trial court properly granted summary judgment in favor of defendants on plaintiffs' breach of contract claim because the claim was untimely. Where the parties' contract required performance within a reasonable time, plaintiffs were not entitled to determine on summary judgment when the breach occurred for purposes of identifying when the statute of limitations began to run. Moreover, evidence showed that the breach occurred at an earlier date than what plaintiffs had claimed.

3. Waters and Adjoining Lands—nuisance—reasonable use of surface water drainage—balancing test—inappropriate on summary judgment

In a dispute between adjacent landowners, where defendant allegedly damaged plaintiffs' property by causing the redirection of water in a drainage ditch running across their properties, the trial court erred in granting summary judgment in defendants' favor on plaintiffs' nuisance claim because the balancing test for determining reasonable use of surface water drainage cannot be completed on summary judgment. Whether defendants' conduct was reasonable was a question for the fact finder.

Appeal by plaintiffs from order entered 16 May 2018 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 13 March 2019.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellants.

Burns, Day & Presnell, P.A., by James J. Mills, for defendant-appellees.

ARROWOOD, Judge.

Dennis T. Brown ("Brown") and Raquel Hernandez ("Hernandez") (together "plaintiffs") appeal from order granting summary judgment in favor of the Lattimore Living Trust (the "trust"), trustees William Timothy Lattimore and Pax Miller Lattimore (the "trustees"), and Proland Development, Inc. ("Proland") (together "defendants"). For the following reasons, we affirm in part and reverse in part.

I. Background

Plaintiffs initiated this action against defendants with the filing of a summons and a complaint in Wake County District Court on 17 May 2017. The complaint alleged that plaintiffs and the trust own adjacent property along Eton Road in Raleigh. Beginning in 2013, the trust made improvements to its property, "including installation of a brick wall and a metal fence along the property line separating the [properties]." Proland was hired by the trustees as the contractor for the wall. Plaintiffs alleged that during the installation of the brick wall, Proland came onto and damaged their property, and then failed to restore their property to its original condition as was agreed upon. Plaintiffs further alleged that the metal fence crosses a drainage ditch and, during heavy rains, causes debris to accumulate in the ditch and divert water, causing erosion on plaintiffs' property. Based on these allegations, plaintiffs asserted claims against defendants for (1) trespass, (2) breach of contract, and (3) nuisance.

After Proland filed its initial response on 12 June 2017 denying the material allegations, on 7 July 2017, plaintiffs filed a motion for summary judgment as to Proland with an attached affidavit of Brown. Proland filed an amended answer on 20 July 2017, in which it asserted various affirmative defenses. The trust and the trustees filed an answer with affirmative defenses and counterclaims on 27 July 2017. On 14 August 2017, Proland's president filed an affidavit.

Plaintiffs' motion for summary judgment was set to be heard on 17 August 2017; but when no one appeared for the hearing, the trial court

dismissed the motion without prejudice. Later that afternoon, plaintiffs filed a withdrawal of their motion for summary judgment as to Proland, which appears to have been signed two days prior. Plaintiffs subsequently filed a response to the trust's counterclaims on 25 August 2017.

On 20 March 2018, defendants filed a motion for summary judgment asserting that summary judgment was proper because "(a) [p]laintiffs' claims are barred, as a matter of law, by the applicable statutes of limitations, and/or (b) there is no genuine issue of material fact as to [p]laintiffs' claims and [d]efendants are entitled to summary judgment as a matter of law." A second affidavit of Brown was filed with exhibits on 7 May 2018 and defendants filed plaintiffs' depositions for the trial court's consideration.

Defendants' motion for summary judgment was heard in Wake County District Court before the Honorable Ned W. Mangum on 10 May 2018. On 16 May 2018, the trial court entered an order granting defendants' motion for summary judgment. Defendants then filed a notice of voluntary dismissal dismissing their counterclaims against plaintiffs without prejudice on 27 June 2018. Plaintiffs filed notice of appeal from the 16 May 2018 summary judgment order on 16 July 2018.

II. Discussion

On appeal, plaintiffs contend the trial court erred by entering summary judgment on each of their three claims: trespass, breach of contract, and nuisance.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). The moving party may meet that burden by showing "either that (1) an essential element of the non-movant's claim is nonexistent; (2) the nonmovant is unable to produce evidence which supports an essential element of its claim; or, (3) the non-movant cannot overcome affirmative defenses raised in contravention of its claims." *Anderson v. Demolition*

Dynamics, Inc., 136 N.C. App. 603, 605, 525 S.E.2d 471, 472, *disc. review denied*, 352 N.C. 356, 544 S.E.2d 546 (2000).

> Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate. Further, when the party moving for summary judgment pleads the statute of limitations, the burden is then placed upon the [nonmovant] to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.

Pharmaresearch Corp. v. Mash, 163 N.C. App. 419, 424, 594 S.E.2d 148, 151-52 (quotation marks and citations omitted), *disc. review denied*, 358 N.C. 733, 601 S.E.2d 858 (2004).

1. Trespass

[1] Plaintiffs first take issue with the trial court's grant of summary judgment on their trespass claim. Plaintiffs' trespass claim sought $1,100.00 from defendants, jointly and severally, for damages to plaintiffs' property resulting from Proland's alleged entry onto, and grading of plaintiffs' property to facilitate installation of the wall without plaintiffs' consent.

Plaintiffs contend that the evidence, viewed in the light most favorable to them, is sufficient to support a claim for trespass. However, plaintiffs acknowledge that N.C. Gen. Stat. § 1-52(3) provides a three year statute of limitations for trespass running from the original trespass, and plaintiffs admit in their brief that "Proland's initial trespass occurred no later than April 25, 2014, which is more than three (3) years prior to May 17, 2017 (the date [p]laintiffs filed the [c]omplaint commencing this action)." In fact, Brown's own deposition testimony was that Proland first came onto his property without permission in August 2013. Brown further testified that Proland last came onto his property without permission in February 2014; but then contradicted himself by stating Proland returned to dump dirt at a later time that he was unable to specify.

Despite conceding the complaint was filed more than three years after the original trespass, plaintiffs argue the statute of limitations was tolled to a later date because Proland promised to repair the damage caused by the trespass, began restoration work, and continued to promise additional restoration work until 2 June 2014. Thus, because the complaint was filed within three years of 2 June 2014 on 12 May 2017,

plaintiffs contend the complaint was timely. Plaintiffs, however, acknowledge that they cannot find a case to support their tolling argument. Plaintiffs instead simply assert "there is no case saying that such tolling is not appropriate; and there are cases with respect to other claims where promises to perform, and partial performance, have been held to toll the applicable statute of limitations."

We are not persuaded the tolling of the statutes of limitations for other types of claims applies to the tolling of the statute of limitations for a continuing trespass. We also could not find any case providing for the tolling of the limitations period for trespass. Instead, we are guided by the plain language of the statute, which provides a three year statute of limitations for trespass upon real property and explicitly states, "[w]hen the trespass is a continuing one, the action shall be commenced within three years from the original trespass, not thereafter." N.C. Gen. Stat. § 1-52(3) (2017).

Because plaintiffs' trespass claim was filed more than three years after Proland's first unauthorized entry and grading of plaintiffs' property, the trespass claim was time barred. Consequently, the trial court did not err in granting summary judgment in favor of defendants on plaintiffs' trespass claim.

2. Breach of Contract

[2] Plaintiffs also challenge the trial court's entry of summary judgment on count two for breach of contract. Plaintiffs presented their breach of contract claim for $1,100.00 in damages in the alternative to their trespass claim. Plaintiffs specifically alleged that "[they] permitted Proland to finish their work [on the wall] on the promise to repair [their property]; Proland breached their promise; and [p]laintiffs are entitled to recover damages for Proland's breach of contract."

Although not explicitly alleged in the complaint, plaintiffs now clearly assert that a contract was formed when they allowed Proland to continue its work on the wall from their property in exchange for Proland's promise to restore their property after completion of the wall. Plaintiffs acknowledge that the contract did not specify a date for the completion of Proland's restorative work, but rely on *International Minerals & Metals Corp. v. Weinstein*, 236 N.C. 558, 561, 73 S.E.2d 472, 474 (1952), for the proposition that the law requires performance of an obligation within a reasonable time in the absence of a specified time.

Plaintiffs' argument on appeal is that there is sufficient evidence, when viewed in the light most favorable to them, that "Proland breached

its contractual obligations by failing to restore [their property] within a reasonable amount of time, and by never proposing a scope of work that would, in fact, have restored [their property]."

Like with their trespass claim, plaintiffs acknowledge that their breach of contract claim is limited by a three year statute of limitations provided in N.C. Gen. Stat. § 1-52(1). Plaintiffs, however, again contend the time to bring the claim did not begin to run until 2 June 2014, when they determined a reasonable amount of time had ended. Specifically, plaintiffs argue "the reasonable time for Proland to perform its contractual obligations ended on June 2, 2014; the date that Plaintiffs determined that a reasonable amount of time had passed; and that Proland had breached its contractual obligations." Based on their determination that a reasonable amount of time expired for Proland's performance on 2 June 2014, plaintiffs contend that the complaint filed on 17 May 2017 was timely. However, even if the breach occurred prior to 2 June 2014, plaintiffs contend the statute of limitations was tolled because Proland continued to promise restorative work.

This Court has made clear that, pursuant to N.C. Gen. Stat. § 1-52(1), "[t]he statute of limitations for a breach of contract action is three years. The claim accrues at the time of notice of the breach." *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002); *see also Harrold v. Dowd*, 149 N.C. App. 777, 781, 561 S.E.2d 914, 918 (2002) ("The statute of limitations for a breach of contract claim begins to run on the date the promise is broken."). The question here is when the breach occurred to commence the running of the statute of limitations.

We are not persuaded by plaintiffs' assertion that they are entitled to determine what constitutes a reasonable amount of time and thereby independently determine when a breach of contract occurs. If the issue came down to reasonableness, it would be an issue of fact that precludes summary judgment. However, email correspondence between plaintiffs and Proland entered into evidence in this case shows that the breach occurred at an earlier time.

That email correspondence shows that Proland had begun, and continued restoration efforts to appease plaintiffs. However, an email from 24 April 2014 shows that plaintiffs were pondering legal action if Proland did not return their property to its original condition; and Proland's response shows that it was unable to return the property to its original condition. Specifically, plaintiffs wrote to Proland, in pertinent part, as follows:

> Do you intend to comply with our demand that our property be restored to its original contours.. [Sic] It seems clear that when you took this job that you knew you would have to remove part of our property to build the brick wall on the property line . . . . You made no attempt to discuss this with us or to try to make an arrangement with us that would have been acceptable to us. You just did it. We need to know your intent to determine if we need to take legal action.

Proland responded, in pertinent part, as follows:

> After we took the large tree down at the front corner of the property, you and I met at the site and I explained how I wanted to slope the severe cut back to make it look right but I didn't want to grade your property without your consent. You were in agreement at that time. . . . I am not sure what you mean by original condition because I can't replant the 60ft. tree that we removed. Even though the tree was on [the trust's property], the root ball of the tree was what disturbed your property when the tree was removed.

Even though the email correspondence shows that Proland intended to continue restoration efforts until plaintiffs wrote them on 2 June 2014, "[d]on't bother we have hired a landscaper and we will take care of it[,]" it is clear from the email exchange on 24 April 2014 that Proland was not able to meet plaintiffs' demands. The breach of any agreement for Proland to restore the property to the original condition occurred at that time, and it is from that day, 24 April 2014, that the statute of limitations began to run. Accordingly, the claim for breach of contract in the complaint filed on 17 May 2017, more than three years after the cause of action accrued, was not timely. Therefore, the trial court did not err by entering summary judgment in favor of defendants on the breach of contract claim.

3. Nuisance

[3] In plaintiffs' final claim for nuisance, plaintiffs alleged that the metal fence installed on the property line causes debris to accumulate and obstructs the flow of water in a drainage ditch that runs across the properties, resulting in unwanted erosion on plaintiffs' property. Plaintiffs further alleged that the accumulation of debris and redirection of the water "causes an unreasonable interference with [their] enjoyment and use of their property[.]" Plaintiffs sought damages or, alternatively, an injunction requiring the trust to move the fence.

Plaintiffs now contend summary judgment on the nuisance claim was improper because, when the facts are construed in their favor, genuine issues of material fact exist. Defendants simply respond that there are no material issues of fact.[1] We agree with plaintiffs that material issues of fact preclude summary judgment on this claim.

Our Supreme Court addressed the required showing for a nuisance claim brought by a private property owner against an adjacent private property owner who improperly diverted surface waters onto the plaintiff's property causing damage in *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977). In that case, the Court adopted "the rule of reasonable use with respect to surface water drainage" and expressed the rule as follows: "[e]ach possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage." *Id.* at 216, 236 S.E.2d at 796. The Court further explained the rule in *Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180 (1980):

> the doctrine of reasonable use adopted in *Pendergrast* defines the extent to which a private landowner may interfere with the flow of surface water on the property of another. This doctrine presupposes that all private landowners must accept a reasonable amount of interference with the flow of surface water by other private landowners if a fair and economical allocation of water resources is to be achieved. The conclusion reached in *Pendergrast* is that a rule of reasonable use with respect to water rights is the best way to promote the orderly utilization of water resources by private landowners.

Id. at 705, 268 S.E.2d at 184.

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1. Although our courts have held the statute of limitations for nuisance is the same as for trespass under N.C. Gen. Stat. § 1-52(3), *see James v. Clark*, 118 N.C. App. 178, 184, 454 S.E.2d 826, 830, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995), our courts have also long held that the diversion onto, or the pooling of water onto another's property is a recurring or renewing trespass, as opposed to a continuing trespass; therefore, the three year statute of limitations does not begin to run from the initial trespass. *See Id.* at 184-85, 454 S.E.2d at 830-31; *Roberts v. Baldwi*n, 151 N.C. 407, 66 S.E. 346 (1909); *Duval v. Atlantic Coast Line R. Co.*, 161 N.C. 448, 77 S.E. 311 (1913); *Whitfield v. Winslow*, 48 N.C. App. 206, 268 S.E.2d 245, *disc. rev denied*, 301 N.C. 405, 273 S.E.2d 451 (1980), *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991). Thus, there is no statute of limitations argument with respect to the nuisance claim in this case based on the recurring trespass alleged in the complaint.

In addition to announcing the reasonable use rule, the Court in *Pendergrast* described the inquiry that must be made, explaining that

> a cause of action for unreasonable interference with the flow of surface water causing substantial damage is a private nuisance action, with liability arising where the conduct of the landowner making the alterations in the flow of surface water is either (1) intentional and unreasonable or (2) negligent, reckless or in the course of an abnormally dangerous activity.
>
> . . . .
>
> Regardless of the category into which the defendant's actions fall, the reasonable use rule explicitly, as in the case of intentional acts, or implicitly, as in the case of negligent acts, requires a finding that the conduct of the defendant was unreasonable. This is the essential inquiry in any nuisance action.

Pendergrast, 293 N.C. at 216-17, 236 S.E.2d at 796-97 (citations omitted).

Most importantly to this case when reviewing a grant of summary judgment, the Court explained that "*[r]easonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant*." *Id.* at 217, 236 S.E.2d at 797 (emphasis added). The court listed considerations in determining the gravity of the harm to the plaintiff and the utility of the conduct of the defendant, and then emphasized that,

> even should alteration of the water flow by the defendant be "reasonable" in the sense that the social utility arising from the alteration outweighs the harm to the plaintiff, defendant may nevertheless be liable for damages for a private nuisance if the resulting interference with another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation. The gravity of the harm may be found to be so significant that it requires compensation regardless of the utility of the conduct of the defendant.

Id. at 217-18, 236 S.E.2d at 797 (quotation marks and citations omitted).

Plaintiffs argue the proper balancing could not be accomplished on defendants' motion for summary judgment. Defendants, however, contend plaintiffs have not established a substantial interference and point

to evidence that Hernandez never used the portion of plaintiffs' property in question, Brown continues to enjoy his property, and the water diversion and erosion is only an issue during those infrequent times when there is lots of rain. Citing *Whiteside Estates Inc. v. Highlands Cove, LLC*, 146 N.C. App. 449, 553 S.E.2d 431 (2001), *Duffy v. Meadows*, 131 N.C. 31, 42 S.E. 460 (1902), and N.C.P.I. -- Civil 805.25, defendants contend plaintiffs have only shown a slight inconvenience or petty annoyance, which is insufficient to support the nuisance claim. Defendants further contend there is nothing unreasonable about their construction of a fence along their property line.

We disagree with defendants' argument. Defendant has essentially performed the fact finder's role by weighing and balancing the evidence. Where the evidence must be weighed and balanced, an issue of fact exists. We note that defendant has even cited the pattern jury instruction for "private nuisance" which puts to the jury the question of whether an interference is substantial, or merely a slight inconvenience or a petty annoyance. *See* N.C.P.I. -- Civil 805.25. This lends support to plaintiffs' argument that the reasonableness inquiry is ordinarily a question for the fact finder.

Construing the evidence in this case in the light most favorable to plaintiffs, the balancing of the gravity of harm to plaintiffs with the utility of the fence to the trust that must be conducted under the reasonable use test adopted in *Pendergrast* was not appropriate for summary judgment. There was sufficient evidence to raise material issues of fact and, therefore, we reverse the trial court's grant of summary judgment in favor of defendants on plaintiffs' nuisance claim.

III. Conclusion

For the reasons discussed, we affirm the trial court's grant of summary judgment in favor of defendants on plaintiffs' trespass and breach of contract claims. However, we reverse the trial court's grant of summary judgment in favor of defendants on plaintiffs' nuisance claim, which presents material issues of fact to be determined under the reasonable use test set forth in *Pendergrast*.

AFFIRMED IN PART, REVERSED IN PART.

Judges BRYANT and DILLON concur.

JANE DOE, PLAINTIFF
v.
WAKE COUNTY, ET AL., DEFENDANTS

No. COA18-109

Filed 2 April 2019

1. Immunity—governmental—tort claims—necessary allegations—waiver of government entity

A plaintiff's tort claims against a county, county agency, and the agency's employees (in their official capacities) for failure to protect her from a dangerous and abusive household were properly dismissed where plaintiff failed to allege in her complaint that the county waived its immunity.

2. Immunity—public officials—tort claims—necessary allegations—malicious conduct

Plaintiff's failure to allege that county employees (in their individual capacities) acted maliciously or outside the scope of their duties—so as to overcome the employees' public official immunity—rendered her tort claims subject to dismissal.

3. Civil Rights—section 1983—state actor—tort allegations—failure to state a claim

Pursuant to the reasoning stated in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), plaintiff's claim that the county department of social services failed to protect her from a dangerous home environment did not implicate a constitutional violation under the Due Process Clause or the Equal Protection Clause, because the agency did not have a constitutional duty to protect her. Further, even if plaintiff's equal protection claim was not barred by *DeShaney*, she neither stated a 'class of one' claim, nor did she allege that public officials acted with malice or corruption.

4. Pleadings—motion to amend—denial—futility of amendment

In a case involving tort and civil rights claims against government entities, there was no abuse of discretion in denying plaintiff's motion to amend her complaint to clarify defendants' names because her failure to state a claim upon which relief could be granted rendered any subsequent amendment futile.

5. Abatement—prior pending action doctrine—two suits—substantially similar—dismissal of second suit

Where plaintiff's second complaint was filed during the pendency of her first complaint and was substantially similar to the first one—including the subject matter, claims, factual allegations, relief requested, and parties—the trial court properly dismissed the second complaint under the prior pending action doctrine.

Appeal by Plaintiff from judgment entered 14 July 2017 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 5 September 2018.

John Locke Milholland IV, Attorney at Law PLLC, by J. Locke Milholland IV, for plaintiff-appellant.

Deputy County Attorney Roger A. Askew, Senior Assistant County Attorney Mary Boyce Wells and Assistant County Attorney Brian K. Kettmer, for defendants-appellees Wake County, et al.

MURPHY, Judge.

Plaintiff, Jane Doe, brought claims against Wake County, Wake County Health Services ("WCHS"), and a number of individual WCHS employees for failing to take action to protect her from a dangerous and abusive household. The Wake County Superior Court dismissed all of Plaintiff's claims under North Carolina Rules of Civil Procedure 12(b)(1), (4), (5), (6), the statute of limitations, and the prior pending action doctrine. After careful review, we affirm the trial court's dismissal of Plaintiff's claims.

BACKGROUND

Plaintiff was born in Wake County in 1996 to a mother who had previously been reported to WCHS for neglecting her first-born child. At birth, Plaintiff tested positive for cocaine, and her mother admitted to using cocaine during her pregnancy. Throughout Plaintiff's youth, WCHS received and investigated at least eight reports indicating her household was a potentially dangerous environment for a child. WCHS investigated the reports and, at various times, referred Plaintiff's mother for counseling, examined Plaintiff for signs of abuse, and provided in-home services to Plaintiff's family.[1]

1. In resolving this appeal, which is comprised solely of procedural issues, we need not describe the specifics of each incident but nevertheless note that the facts of Plaintiff's complaint paint the picture of a tragic and frightening childhood.

Plaintiff sued WCHS and its employees—identified as "John Doe 1, John Doe 2, . . . John Doe N"—in tort and under 42 U.S.C. § 1983 for failing to remove her from the care of her mother at eight different points in time. In response, Defendants asserted a number of affirmative defenses and moved to dismiss the complaint on various grounds. Plaintiff moved for leave to amend her complaint to add parties and three days later filed a second complaint, which named Wake County, WCHS, and a number of WCHS employees in both their individual and official capacities. Defendants moved to dismiss this second complaint on the same grounds as the first and also raised the prior pending action doctrine. The trial court dismissed both of Plaintiff's complaints and denied her motion for leave to amend as futile. Plaintiff appeals.

ANALYSIS

"We review a trial court's decision to dismiss a complaint de novo." *Robert K. Ward Living Trust ex rel. Schulz v. Peck*, 229 N.C. App. 550, 552, 748 S.E.2d 606, 608 (2013). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotations omitted). The trial court dismissed Plaintiff's claims "pursuant to North Carolina Rules of Civil Procedure 12(b)(1), [(4), (5), and (6)], the statute of limitations, and the prior pending action doctrine," but did not delineate which claims were being dismissed on which grounds. Nevertheless, we affirm both of the trial court's dismissal orders.

A. 16 CVS 15483

In her first complaint, Plaintiff alleged forty causes of action: thirty-two tort claims against Wake County, WCHS, and their employees (both in their official and individual capacities), and eight claims under 42 U.S.C. § 1983 alleging constitutional violations. Additionally, Plaintiff moved to amend her complaint and the trial court denied her motion. In subsections 1 and 2 below, we address Plaintiff's tort claims. In subsections 3 and 4, we analyze her federal claims and motion to amend, respectively. In all four subsections, we affirm the trial court's decisions.

1. Tort Claims against Wake County, WCHS, and Employees in their Official Capacity

[1] Plaintiffs bringing claims otherwise barred by governmental immunity must allege a waiver of immunity in their complaint for the trial court to have subject matter jurisdiction over those claims. *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 62-63, 730

S.E.2d 254, 257 (2012). "[A] county normally would be immune from liability for injuries caused by negligent social services employees working in the course of their duties." *Estate of Earley v. Haywood Cnty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 340, 694 S.E.2d 405, 408 (2010). Here, Plaintiff "agrees that [her] claims in tort cannot proceed against the County and defendants in their official capacity[,]" but argues "[a]ll tort claims against defendants in their individual capacity should proceed."

Plaintiff correctly recognizes her failure to allege that Wake County waived immunity is fatal to her complaint to the extent it asserts tort claims against the county and its officials. *Clark v. Burke Cnty.*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994) ("When suing a county or its officers, agents or employees, the complainant must allege [a] waiver in order to recover."). The trial court was correct to dismiss all thirty-two of Plaintiff's tort claims against Wake County and WCHS, and those against individual Defendants in their official capacities.

2. "Individual Capacity" Tort Claims

[2] We next address Plaintiff's tort claims against county employees in their individual capacities. *See Wright v. Gaston Cty.*, 205 N.C. App. 600, 602, 698 S.E.2d 83, 86 (2010) ("Plaintiff's complaint also alleges claims against the [defendants] in their individual capacities, for which governmental immunity is not applicable."). The individual Defendants argue they are entitled to dismissal based upon public official immunity because Plaintiff's claims against them in their individual capacities fail "to sufficiently 'pierce the cloak' of public official [immunity] . . . ." We agree.

"Public official immunity is a derivative form of governmental immunity." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012) (internal citations omitted). The doctrine distinguishes between public officials, who are entitled to immunity, and public employees, who are not. *Id.* Social workers are generally considered public officials, or state employees who exercise some amount of sovereign power through acts "requiring personal deliberation, decision and judgment." *Hobbs v. N.C. Dep't of Human Res.*, 135 N.C. App. 412, 421, 520 S.E.2d 595, 602 (1999); *Meyer v. Walls*, 347 N.C. 97, 113-14, 489 S.E.2d 880, 889 (1997).

To rebut a claim of public official immunity and hold a public official liable in her individual capacity, a plaintiff's complaint must allege "that [the official's] act, or failure to act, was corrupt or malicious, or that [the official] acted outside of and beyond the scope of his duties." *Hobbs*, 135 N.C. App. at 422, 520 S.E.2d at 603. Additionally, our Supreme Court has

noted, "a conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion." *Meyer*, 347 N.C. at 114, 489 S.E.2d at 890.

The facts alleged in Plaintiff's complaint do not support a conclusion the individual workers acted corruptly, maliciously, or outside the scope of their duties. Plaintiff does not offer any facts or forecast any evidence that any individually named defendant took actions that went beyond—at worst—simple negligence such that her complaint pierces the cloak of public official immunity. "Because we presume [the] defendant[s] discharged [their] duties in good faith and exercised [their] power in accordance with the spirit and purpose of the law and plaintiffs have not shown any evidence to the contrary," we hold Plaintiff's complaint "fail[s] to allege facts which would support a legal conclusion that defendant[s] acted with malice." *Mitchell v. Pruden*, ___ N.C. App. ___, ___, 796 S.E.2d 77, 83 (2017).

The allegations in Plaintiff's complaint do not overcome Defendants' public official immunity, and the trial court did not err in granting the Defendants' motion to dismiss under the doctrine of public official immunity.

3. 42 U.S.C. § 1983 Claims

[3] Plaintiff argues the trial court's dismissal of her 42 U.S.C. § 1983 claims for failure to state a claim under Rule 12(b)(6) was improper. We disagree. Dismissal under 12(b)(6) is appropriate where "the complaint on its face reveals that no law supports the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). "The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). Here, Plaintiff has not alleged any claim entitling her to relief under 42 U.S.C. § 1983.

a. Due Process Clause

Plaintiff's suit is almost identical to that in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249 (1989). In *DeShaney*, the Department of Social Services ("DSS") suspected a child had been abused by his father, but nevertheless allowed him to return home with his father. *Id.* at 192, 103 L. Ed. 2d at 256-57. Shortly thereafter, the child was beaten nearly to death by his father and sued DSS under 42 U.S.C. § 1983. *Id.* at 193, 103 L. Ed. 2d at 257. The U.S.

Supreme Court stated that the Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202, 103 L. Ed. 2d at 263. "Because . . . the State had no constitutional duty to protect [the child] against his father's violence, its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause." *Id.*

Under *DeShaney*, a state actor's failure to take affirmative action to protect a private individual is not actionable under the Fourteenth Amendment and 42 U.S.C. § 1983. *Id.* As such, Plaintiff may not recover under 42 U.S.C. § 1983 and the Due Process Clause. We affirm the trial court's dismissal of those claims.

b. Equal Protection Clause

Plaintiff also argues the trial court erred in dismissing her 42 U.S.C. § 1983 claims to the extent they allege violations of her rights under the Equal Protection Clause. We disagree.

Plaintiff's "class of one" equal protection argument is largely premised upon an incorrect interpretation of two footnotes in *DeShaney*. Footnote two denies the plaintiff's argument that his equal protection rights were violated because he had an "entitlement" to receive protective services. *Id.* at 195, 103 L. Ed. 2d at 258, note 2. Similarly, footnote three makes the common-sense statement that "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Id.* at 197, 103 L. Ed. 2d at 259, note 3. Both footnotes are, of course, dicta, and neither dilutes the case's central holding that a state social worker's failure to take affirmative action to protect a private individual does not amount to a constitutional violation. *Id.* at 202, 103 L. Ed. 2d at 263. Plaintiff does not cite any authority in our jurisdiction or elsewhere that states otherwise.

Assuming *arguendo* Plaintiff's equal protection claim is not barred by *DeShaney*, Plaintiff nevertheless fails to state a "class of one" equal protection claim upon which relief may be granted. "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 1063 (2000). On its face, this pleading requirement is similar to that of a plaintiff attempting to pierce the cloak of public official immunity. As we stated in Section A-2, *infra*, Plaintiff's complaint fails to adequately allege facts that the public officials acted

with malice or corruption, and for the same reason she has failed to state a class of one equal protection claim.

WCHS's failure to take affirmative actions to protect Plaintiff from a dangerous household is not a constitutional violation and therefore does not render Wake County or its agents liable in the manner Plaintiff's complaint alleges. The trial court's dismissal of Plaintiff's 42 U.S.C. § 1983 claims is affirmed.

4. Plaintiff's Motion to Amend

[4] Plaintiff additionally argues the Superior Court abused its discretion by denying Plaintiff's *Motion for Leave to Amend* her first suit. "A trial court abuses its discretion only where no reason for the ruling is apparent from the record. Our Courts have held that reasons justifying denial of leave to amend [include] . . . futility of amendment." *Rabon v. Hopkins*, 208 N.C. App. 351, 353-54, 703 S.E.2d 181, 184 (2010) (internal citation omitted). Here, it is apparent from the record that the trial court's reason for denying Plaintiff's motion was that such an amendment would be futile.

Plaintiff sought leave to amend her first complaint in order to replace defendants "John Doe 1, John Doe 2, etc." with named defendants. However, for the reasons discussed above, Plaintiff failed to state a claim upon which relief could be granted. Therefore, any further amendment would be futile and the Superior Court's denial of Plaintiff's *Motion for Leave to Amend* was not an abuse of discretion.

B. 17 CVS 3821

[5] For the reasons stated in Section A, *infra*, the trial court did not err in dismissing Plaintiff's second complaint. Additionally, the prior pending action doctrine serves as an independent bar to Plaintiff's second suit.

When "the parties and subject matter of the two suits are substantially similar, the first action will abate the subsequent action if the prior action is determined to be pending in a court within the state having like jurisdiction." *Eways v. Governor's Island*, 326 N.C. 552, 559, 391 S.E.2d 182, 186 (1990). "This is so because the court can dispose of the entire controversy in the prior action" and, by doing so, render the subsequent action moot. *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990). "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues

involved, and relief demanded?" *Cameron v. Cameron*, 235 N.C. 82, 85, 68 S.E.2d 796, 798 (1952).

Plaintiff brought her second suit against Wake County and WCHS during the pendency of her first suit. Both were filed in the Wake County Superior Court, the first on 22 December 2016 and the second on 27 March 2017. The subject matter of both cases is identical; Plaintiff asserted exactly the same claims, made virtually identical factual allegations, and demanded the same relief in both complaints. Additionally, Plaintiff's suits presented substantially identical parties, the only difference being that the first suit listed "John Doe 1, John Doe 2, . . . John Doe N," and the second suit listed named Defendants previously identified as John Doe. Both cases are between Plaintiff and Wake County, WCHS, and employees thereof. The trial court did not err in dismissing Plaintiff's second suit, 17 CVS 3821, under the prior pending action doctrine.

CONCLUSION

We affirm the trial court's orders granting Defendants' motions to dismiss under North Carolina Rule of Civil Procedure 12(b)(6), in 16 CVS 15483, and the prior pending action doctrine, in 17 CVS 3821. Likewise, we affirm the trial court's denial of Plaintiff's *Motion for Leave to Amend*.

AFFIRMED.

Judges STROUD and ZACHARY concur.

ERIC ERICKSON, PETITIONER
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA18-820

Filed 2 April 2019

1. Appeal and Error—contested case—Office of Administrative Hearings—notice of appeal—file stamp requirement—Rule 2

Although petitioner's notice of appeal from a final decision of the Office of Administrative Hearings was neither file-stamped nor time-stamped—and, therefore, bore a jurisdictional defect under Appellate Rules 3 and 18—the Court of Appeals invoked Appellate Rule 2 to hear the appeal and prevent manifest injustice.

2. Public Officers and Employees—contested case—dismissal—internal grievance procedure—inadequate notice

Where a state agency failed to meet its burden under the State Human Resources Manual of informing petitioner, a dismissed employee, of the timeframe for challenging his dismissal through the agency's internal grievance process, the Office of Administrative Hearings erred by dismissing petitioner's contested case for lack of subject matter jurisdiction for failure to exhaust administrative remedies. The agency had provided petitioner with a form containing contradictory instructions for initiating the internal grievance process.

Appeal by petitioner from final decision entered 8 May 2018 by Administrative Law Judge Selina Malherbe in the Office of Administrative Hearings. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for the State.

Humphrey S. Cummings for petitioner-appellant.

TYSON, Judge.

Eric Erickson ("Petitioner") appeals a final decision from the Office of Administrative Hearings ("OAH"), which dismissed his contested case petition for the lack of subject-matter jurisdiction. We reverse and remand.

I. Background

Petitioner worked for the North Carolina Department of Public Safety ("DPS") as a probation and parole officer in Charlotte. On 8 January 2018, Petitioner was dismissed for cause from DPS. Petitioner initiated a challenge to his dismissal through DPS' internal grievance process on 23 January 2018.

"Step 1" of the grievance process consists of a mediation conference. Mediation between Petitioner and DPS personnel was conducted on 21 February 2018. The mediation conference ended in an impasse. Petitioner was provided with a copy of DPS Form HR 556, which provides notice of an employee's appeal to "Step 2" of DPS' grievance process, if an impasse occurs at "Step 1." The heading of the Form HR 556 provided to Petitioner states, in relevant part: "To appeal to Step 2 of the grievance process, this form must be *filed* within **five (5) calendar days** following an impasse in mediation. If this form is not *received* within this timeframe, it will not be accepted." (First and third emphasis supplied). Above the signature line for employees, Form HR 556 states:

> I understand that it is my responsibility *to mail*, email, or hand deliver my Step 2 Appeal to the Grievance Intake Coordinator to *initiate* the appeal process within five (5) calendar days of the mediation impasse.
>
> I understand that my signature acknowledges that I have been advised of Step 2 appeal rights and timeframes. (Emphasis supplied).

The Employee Grievance Policy section of the State Human Resources Manual, included within the record on appeal, states, in relevant part: "At the end of the mediation session, *the agency shall inform the grievant of the Step 2 grievance process and that the filing must be received by the agency within 5 calendar days of the date of mediation*." (Emphasis supplied). State Human Resources Manual, Employee Grievance Policy, § 7, at 38.

Petitioner's evidence tends to show he signed and dated DPS Form HR 556 on Wednesday, 21 February 2018, but did not file, submit, or mail it on that date. Petitioner purportedly mailed the form on Friday, 23 February 2018. DPS received the form on Tuesday, 27 February 2018, allegedly one day too late to effectuate Step 2. In a letter dated 27 February 2018, DPS advised Petitioner that his Form HR 556 was "untimely received" and that he had "no further appeal rights through the Formal Internal Grievance Process." In response to correspondence

from Petitioner's counsel, DPS sent two subsequent letters re-stating that his Step 2 request was untimely and that he had no further appeal rights through DPS' internal grievance process.

On 23 March 2018, Petitioner filed a petition for a contested case hearing with OAH. DPS filed a motion to dismiss based upon N.C. Gen. Stat. § 126-34.02; the doctrine of sovereign immunity; and Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(3). DPS attached to its motion to dismiss the affidavit of Tracy Perry, the DPS Grievance Intake Coordinator. Included as an exhibit to the affidavit was, among other things, a photocopy of the front of the envelope inside which Petitioner had mailed the completed, dated, and signed Form HR 556.

On 8 May 2018, an administrative law judge (the "ALJ") issued a final decision granting DPS' motion to dismiss Petitioner's contested case petition based upon a lack of subject matter jurisdiction. The ALJ's final decision concluded Petitioner had failed to exhaust administrative remedies. Petitioner filed notice of appeal to this Court.

II. Jurisdiction

Jurisdiction lies in this Court from a final decision of OAH pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 126-34.02(a) (2017).

III. Notice of Appeal

[1] Petitioner's notice of appeal contained in the record on appeal has neither been file-stamped nor time-stamped to indicate when Petitioner filed it with OAH. DPS has not raised an argument regarding this deficiency in the notice of appeal nor filed a motion to dismiss. Rule of Appellate Procedure 18 governs appeals from OAH and does not specifically state whether the notice of appeal has to be filed with OAH, as Rule 3 requires with notices of appeal in civil cases from superior or district court. *See* N.C. R. App. P. 18.

However, Rule 18(b)(1) provides: "The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise[.]" N.C. R. App. Proc. 18(b). Rule 18(c)(9) requires that the record on appeal contain: "a copy of the notice of appeal from the administrative tribunal[,]" and Rule 18(e) provides: "Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions." N.C. R. App. P. 18(c) and (e)

N.C. Gen. Stat. § 126-34.02(a) specifically provides that a notice of appeal from a contested case "shall be filed with [OAH] and served on all parties to the contested case hearing." N.C. Gen. Stat. § 126-34.02(a).

In appeals from the trial court division and other administrative tribunals, this Court has held the appellant's failure to include a file-stamped copy of the notice of appeal in the record on appeal is a jurisdictional defect, because this Court cannot determine if the notice of appeal was timely filed. *See, e.g.*, *Bradley v. Cumberland Cty.*, __ N.C. App. __, 822 S.E.2d 416, 420 (2018) (dismissing appeal from Industrial Commission where notice of appeal did not have "a time stamp, file stamp, or any other designation" showing the Commission had received notice of appeal); " *Brooks*, *Comm'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) ("Without proper notice of appeal, this Court acquires no jurisdiction." (citations omitted)).

No prior case deals with the absence of a file stamped notice of appeal from OAH under Rule 18. However, because lack of a file-stamped notice of appeal is a jurisdictional defect in civil appeals under Rule 3 and the statute requires that notices of appeal be filed with OAH within "30 days of receipt of the written notice of final decision[,]" we discern no reason why notices of appeal from OAH should not be required to bear a filed and stamped verification confirming the date and time the notice of appeal was filed with OAH. N.C. Gen. Stat. § 126-34.02(a).

In response to an inquiry regarding OAH's policy and procedures on notices of appeal, OAH indicated that when a party emails OAH a notice of appeal, the party does not receive any confirmation, file-stamp, or notation from OAH. OAH considers the sent date and time on the email to be the file-stamp for purposes of noting when the notice of appeal is filed.

When a party files a notice of appeal through OAH's electronic filing portal, an electronic date and time stamp will be affixed to the filing. OAH provided this Court a copy of Petitioner's notice of appeal, which included the email through which Petitioner had sent the notice of appeal as an attachment.

Petitioner failed to include a copy of this accompanying email in the record. "It is well established that the appellant bears the burden of showing to this Court that the appeal is proper." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). At oral argument before this Court, Petitioner made a motion to treat his notice and record on appeal as a petition for a writ of *certiorari*.

Due to Petitioner's lack of knowledge regarding OAH's policy of not adding a file-stamp to emailed notices of appeal, and DPS' failure to file a motion to dismiss or to argue the notice of appeal was not timely filed,

we find Petitioner would suffer manifest injustice were we to dismiss Petitioner's appeal.

"Rule 2 of the North Carolina Rules of Appellate Procedure permits this Court to suspend or vary the requirements of the Rules to prevent manifest injustice to a party, or to expedite decision in the public interest." *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 (2005) (quotation marks and brackets omitted). To prevent manifest injustice, we invoke Rule 2 to treat Petitioner's appeal as a petition for a writ of *certiorari* and review Petitioner's arguments on the merits. *See Sarno v. Sarno*, __ N.C. App. __, __, 804 S.E.2d 819, 823 (2017) (treating appeal as petition for writ of *certiorari* despite defect in notice of appeal); *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) ("This Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat the purported appeal as a petition for writ of certiorari and grant it in our discretion." (citations and quotation marks omitted)).

IV. Standard of Review

" 'Our standard of review of a motion to dismiss for lack of [subject matter] jurisdiction . . . is *de novo*.' " *Hunt v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 817 S.E.2d 257, 260 (2018) (quoting *Brown v. N.C. Dep't of Pub. Safety*, __ N.C. App.__, __, 808 S.E.2d 322, 324 (2017)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

V. Analysis

[2] Petitioner argues OAH erroneously dismissed his contested case for lack of subject matter jurisdiction due to his failure to exhaust available administrative remedies. We agree.

Under the North Carolina Human Resources Act:

> Any State employee having a grievance arising out of or due to the employee's employment shall first discuss the problem . . . with the employee's supervisor . . . . *Then the employee shall follow the grievance procedure approved by the State Human Resources Commission.* The proposed agency final decision shall not be issued nor become final until reviewed and approved by the Office of State Human Resources. The agency grievance procedure

> . . . and review shall be completed within 90 days from the date the grievance is filed.

N.C. Gen. Stat. § 126-34.01 (2017) (emphasis supplied).

With regards to the "grievance procedure approved by the State Human Resources Commission," *id.*, the "Employee Grievance Policy," included within the State Human Resources Manual, states "Each agency shall adopt the Employee Grievance Policy as approved by the State Human Resources Commission." State Human Resources Manual, Employee Grievance Policy, § 7, at 26.

Specifically, with regards to grievance appeal rights, the Employee Grievance Policy provides: "At the end of the [Step 1] mediation session, the agency *shall inform* the grievant of the Step 2 grievance process *and* that the filing must be received by the agency within 5 calendar days of the date of mediation." *Id.* at 34. (emphasis supplied).

The Employee Grievance Policy clearly places the burden upon agencies, including DPS, to inform employees of the Step 2 grievance process *and* the timeframe for when Step 2 filings must be received.

At the conclusion of the Step 1 mediation conference, DPS provided Petitioner their standard Form HR 556 to appeal to Step 2 of the grievance process. DPS Form HR 556 contains contradictory and ambiguous language regarding the timeframe an employee has to submit the form. A black-bordered box at the top of the form states: "To appeal to Step 2 of the grievance process, this form *must be filed* within five (5) calendar days following an impasse in mediation. If this form is not *received* within this timeframe, it will not be accepted." (Emphasis supplied).

In the signature section of Form HR 556, the form reads: "I understand that it is my responsibility to *mail*, email, or hand deliver my Step 2 Appeal to the Grievance Intake Coordinator to *initiate* the appeal process *within five (5) calendar days* of the meditation impasse." The discrepancies and inconsistencies between "filed," "received," "mail," and "initiate" within Form HR 556 are insufficient to inform an employee of whether the form has to be *mailed*, *filed*, or *received* within five days of a mediation impasse. DPS Form HR 556 fails to satisfy DPS' burden to inform Petitioner "of the Step 2 grievance process and that the filing must be received by the agency within 5 calendar days of the date of mediation[,]" as required by the State Human Resources Commission's Employee Grievance Policy.

In other contexts, this Court has construed ambiguous language against the drafting party, and in favor of the non-drafting party. *See*, *e.g.*,

Novacare Orthotics & Prosthetics E., Inc. v. Speelman, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000) ("[W]hen an ambiguity is present in a written instrument, the court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language." (citation omitted)). Defendant had no role in drafting Form HR 556, and the Employee Grievance Policy places an affirmative duty on state agencies to inform employees of their Step 2 appeal rights and the applicable timeframes. We construe the ambiguities and discrepancies contained within Form HR 556 against DPS and in favor of Petitioner.

Viewed in the light most favorable to him, Petitioner complied with DPS' instructions to "mail" or "file" Form HR 556 within "five calendar days" of the impasse of Step 1 mediation. Petitioner stated in his affidavit, submitted to OAH, that he had mailed Form HR 556 "to the designated address in Raleigh on February 23, 2018." This act occurred within five calendar days of the mediation impasse on 21 February.

DPS contends they received Petitioner's Form HR 556 a day late, on 27 February. At oral argument before this Court, DPS' counsel conceded Petitioner would have had to have mailed Form HR 556 before 27 February for DPS to have received it by that date. DPS Grievance Intake Coordinator Perry noted on the envelope in which Petitioner had mailed his Form HR 556, that the envelope has "No postal markings." While the envelope does not bear a cancellation or post mark, it does bear an electronically printed barcode and nine-digit ZIP code. The envelope also shows Petitioner correctly labeled the mailing address of the Grievance Intake Coordinator, as was listed on Form HR 556, and affixed proper postage.

Petitioner substantially complied with the instructions on Form HR 556, and initiated Step 2 of DPS' grievance procedure by mailing Form HR 556 within five calendar days of the impasse at Step 1 mediation. Petitioner was entitled to proceed to Step 2 of DPS' grievance procedure. We reverse OAH's order granting DPS' motion to dismiss for lack of subject matter jurisdiction for failure to exhaust administrative remedies.

By refusing Petitioner's timely mailed Form HR 556, DPS prevented Petitioner from obtaining a "final agency decision" "reviewed and approved by the Office of State Human Resources" to vest OAH with jurisdiction to hear Petitioner's contested case. N.C. Gen. Stat. §§ 126-34.01, 126-34.02. We reverse and remand the matter to OAH, with instructions to order DPS to permit Petitioner to proceed to Step 2 of DPS' internal grievance process. We express no opinion on the relative merits of the parties' claims or assertions regarding Petitioner's dismissal.

VI. Conclusion

Petitioner timely mailed a completed and signed Form HR 556 to "initiate" Step 2 of DPS' internal grievance procedure. The ALJ erred in concluding Petitioner had failed to exhaust his administrative remedies and in granting DPS' motion to dismiss. We reverse the ALJ's order and remand with instructions for OAH to order DPS to allow Petitioner to proceed to Step 2 of DPS' internal grievance process. *It is so ordered.*

REVERSED AND REMANDED.

Judges STROUD and ARROWOOD concur.

RABO AGRIFINANCE, LLC FKA RABO AGRIFINANCE, INC.,
PLAINTIFF-JUDGMENT CREDITOR
v.
ANGELA SILLS, DEFENDANT-JUDGMENT DEBTOR

No. COA18-846

Filed 2 April 2019

Enforcement of Judgments—loan contract—foreign default judgment—enforceable in North Carolina

Where a North Carolina farmer defaulted on a loan she received from an Iowa company, and where the loan contract included a clause providing that the farmer consented to personal jurisdiction in Iowa, the default judgment that the company obtained against the farmer in an Iowa court was enforceable in North Carolina. Iowa law governed the loan contract because the parties entered into the contract in Iowa; therefore, where the consent to jurisdiction clause was valid under Iowa law, the Iowa court properly exercised jurisdiction over the farmer.

Appeal by plaintiff from order entered 24 April 2018 by Judge Mark E. Klass in Harnett County Superior Court. Heard in the Court of Appeals 30 January 2019.

Womble Bond Dickinson (US) LLP, by Michael Montecalvo, for plaintiff-appellant.

No appellee brief filed.

DIETZ, Judge.

Angela Sills, a farmer in Sampson County, applied for a loan from Rabo Agrifinance, LLC, an Iowa company that offers financing to farmers and other agricultural businesses. The loan contract included a clause providing that Sills consented to personal jurisdiction in the Iowa courts.

Sills later defaulted on the loan and Rabo obtained a default judgment against Sills in an Iowa state court. When Rabo sought to enforce that judgment in North Carolina, Sills sought relief from the judgment under Rule 60(b)(4), arguing that the Iowa court did not have personal jurisdiction over her. The trial court agreed and granted relief from the Iowa judgment.

As explained below, we reverse the trial court's order. The parties' contract is governed by Iowa law and the consent to jurisdiction clause is valid under Iowa law. Accordingly, the Iowa court properly exercised jurisdiction over Sills and the judgment is enforceable in our State courts.

Facts and Procedural History

On 17 December 2007, Angela Sills, a resident of Sampson County, entered into an account agreement with Rabo Agrifinance, LLC, an Iowa business, to secure financing for a farming operation. The agreement contained a clause stating that Sills "knowingly and voluntarily consent[s] to be subject to the jurisdiction in the State of Iowa for purposes of adjudicating any rights and liabilities of the parties." After Sills defaulted on the loan, Rabo obtained a default judgment of $61,113.78 plus interest from a state trial court in Iowa.

Rabo then sought to enforce the Iowa judgment against Sills in North Carolina. Sills moved for relief from the Iowa judgment, asserting that the judgment should be set aside because she had never been in Iowa, had no contacts with Iowa, and was unaware of the consent to jurisdiction clause in the contract. After a hearing, the trial court granted Sills's motion for relief from the judgment under Rule 60(b)(4) based on lack of personal jurisdiction. Rabo timely appealed.

Analysis

This case is governed by the Uniform Enforcement of Foreign Judgments Act, which addresses recognition and enforcement of other states' judgments in the North Carolina court system. N.C. Gen. Stat. §§ 1C-1701–1C-1708. The Act provides that a judgment debtor may seek relief from a foreign judgment on any ground "for which relief from a judgment of this State would be allowed." N.C. Gen. Stat. § 1C-1705(a).

Although this language is broad, it is limited by the Full Faith and Credit Clause of the United States Constitution. As our Supreme Court has explained, "the defenses preserved under North Carolina's UEFJA are limited by the Full Faith and Credit Clause to those defenses which are directed to the validity and enforcement of a foreign judgment . . . such as . . . that the rendering state lacked personal or subject matter jurisdiction." *DOCRX, Inc. v. EMI Servs. of North Carolina, LLC*, 367 N.C. 371, 382, 758 S.E.2d 390, 397 (2014).

Here, the trial court granted relief from the judgment after concluding that the Iowa court lacked personal jurisdiction over Sills. The trial court's order is focused primarily on Sills's contacts with the State of Iowa but we need not address that question because, on appeal, Rabo does not dispute Sills's lack of contact with Iowa generally. Instead, Rabo focuses on the fact that the parties entered into the contract in Iowa and that the contract contains a consent to jurisdiction clause that is enforceable under Iowa law.

We agree with Rabo that the parties entered into this contract in Iowa. The "interpretation of a contract is governed by the law of the place where the contract was made." *Schwarz v. St. Jude Med., Inc.*, __ N.C. App. __, __, 802 S.E.2d 783, 788 (2017). Under both North Carolina and Iowa law, a contract is made in the place where the last act necessary to a complete meeting of the minds of the parties is performed, usually the place of acceptance. *Id.* at __, 802 S.E.2d at 790–91; *Burch Mfg. Co. v. McKee*, 2 N.W.2d 98, 101 (Iowa 1942).

The record indicates that the place of acceptance of this contract was Iowa. The contract, entitled "Account Agreement" is, in essence, a credit application. It provides expressly that when the credit application is "approved by [Rabo] in writing, [Rabo] shall then notify you of its approval," that there is no agreement until "a written commitment [is] signed by [Rabo]," and that "the acceptance and approval of the Application and this Agreement occurred in Cedar Falls, Iowa and that performance of this Agreement by you involves payment to [Rabo] in Cedar Falls, Iowa." Thus, under both Iowa and North Carolina law, acceptance of this contract occurred in Iowa and Iowa law applies to the contract. *Schwarz*, __ N.C. App. at __, 802 S.E.2d at 790–91; *Burch*, 2 N.W.2d at 101.

The contract contains a consent to jurisdiction clause providing that Sills consents to personal jurisdiction in the Iowa courts:

> **Consent to Jurisdiction**: . . . You knowingly and voluntarily consent to be subject to the jurisdiction in the State of

> Iowa for purposes of adjudicating any rights and liabilities of the parties pursuant to this Agreement, with venue to be in the Iowa District Court for Black Hawk County, Iowa, or the United States Federal District Court for the Northern District of Iowa.

Iowa Courts have repeatedly held that this type of consent to jurisdiction clause is "*prima facie* valid and should be enforced." *Liberty Bank, F.S.B. v. Best Litho, Inc.*, 737 N.W.2d 312, 315 (Iowa Ct. App. 2007). To invalidate the clause, the contesting party must show "that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* Applying this reasoning, the Iowa courts have rejected arguments that a consent to jurisdiction clause should be invalidated because the clause was not prominently displayed or the party challenging it claimed not to have read or understood it when agreeing to the contract terms. *Id.*; *EFCO Corp. v. Norman Highway Constructors, Inc.*, 606 N.W.2d 297, 300 (Iowa 2000).

We find nothing in the record suggesting that the clause is invalid under Iowa law. Although Rabo unquestionably is a more sophisticated party than Sills, the contract language is clear, Sills understood that Rabo was an Iowa business, and Sills had a full opportunity to review the contract before agreeing to its terms. Accordingly, the trial court erred when it found that Sills "did not consent to personal jurisdiction in Iowa." She did so by agreeing to be bound by the terms of the contract. We therefore reverse the trial court's order granting relief from the Iowa judgment under Rule 60(b)(4) on the ground that "Iowa lacked personal jurisdiction" over Sills.

Conclusion

For the reasons stated above, we reverse the trial court's order.

REVERSED.

Judges STROUD and BERGER concur.

STATE OF NORTH CAROLINA
v.
XAVIER LAMAR HORTON, DEFENDANT

No. COA18-997

Filed 2 April 2019

Search and Seizure—reasonable suspicion—traffic stop—vague anonymous tip—car in parking lot of closed business—no trespass or traffic infraction

A police officer lacked reasonable suspicion to stop defendant's vehicle where there was a vague anonymous report of a suspicious male walking around the parking lot of a closed business at 8:40 pm, the officer was familiar with the area and knew there had been break-ins, defendant ignored the officer and continued exiting the parking lot in his vehicle when the officer spoke to him, and defendant did not commit any traffic infractions to justify a traffic stop. The officer had nothing more than a hunch that a crime might be underway, and the trial court erred by denying defendant's motion to suppress.

Appeal by Defendant from Judgment entered 10 April 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashish K. Sharda, for the State.

Grace Tisdale & Clifton, PA, by Michael A. Grace, Greer B. Taylor, and Christopher R. Clifton, for Defendant-Appellant.

INMAN, Judge.

Defendant Xavier Lamar Horton ("Defendant") appeals his convictions for possession with intent to sell or deliver cocaine, possession of a stolen firearm, possession of a firearm by a felon, and attaining habitual felon status. Defendant argues that his motion to suppress evidence obtained in a traffic stop was erroneously denied, contending that the police officer who conducted the stop lacked reasonable suspicion that he was committing, or about to commit, a crime. After thorough review of the record and applicable law, we reverse the trial court's order denying the motion to suppress and vacate Defendant's convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant pled guilty to all charges following the trial court's denial of his motion to suppress. The record and the evidence introduced at trial, consisting of the suppression hearing and Defendant's plea colloquy, tended to show the following:

Sometime after 8:40 pm on 25 November 2016, Officer Nathan Judge ("Officer Judge") of the Graham Police Department in Alamance County received a dispatch call relaying an anonymous report concerning a "suspicious white male," with a "gold or silver vehicle" in the parking lot, walking around a closed business, Graham Feed & Seed.[1] Officer Judge knew that another business across the street experienced a break-in in the past and that there were previous residential break-ins and vandalism in the area.[2]

When Officer Judge arrived at Graham Feed & Seed, he discovered a silver Nissan Altima in the parking lot in front of the business. He saw no one walking in the parking lot. After parking near the southern area exit of the parking lot, Officer Judge stepped out of his patrol vehicle and walked toward the silver car "as [it] was approaching" the exit.[3] When Officer Judge was "within arm's length" of the vehicle, he shined his flashlight toward the closed window of the driver's side of the vehicle and saw Defendant, a black male, in the driver's seat. Defendant did not lower the vehicle window. Officer Judge asked Defendant, "What's up boss man?" Defendant "made no acknowledgement," but merely displayed a "blank expression on his face," and continued to exit the parking lot.

Officer Judge considered Defendant's behavior to be a "little odd," and decided to follow Defendant because he "didn't know what [he] had." After catching up to Defendant's vehicle onto the main road, without "observ[ing] any bad driving, traffic violations, criminal offenses, or furtive movements," Officer Judge activated his patrol lights and siren to initiate a traffic stop.

After Defendant pulled over and stopped his vehicle and lowered the driver's side window, Officer Judge approached, "immediately smelled a

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1. No evidence was introduced for when Officer Judge received the call or when he arrived at the business' parking lot.

2. No evidence was introduced as to when these alleged crimes occurred.

3. The trial court's findings of fact are unclear as to whether the vehicle was already in motion on or before Officer Judge's arrival.

strong odor of marijuana and air fresheners," noticed a female passenger in the vehicle, and called for officer assistance. Officer Judge asked Defendant for his license and registration. Defendant admitted that he did not have his license and provided his name and date of birth. The front seat passenger stated that the vehicle was registered in her name.[4]

After Officer Judge began searching the vehicle, Defendant admitted marijuana would be found in the center console. Officer Judge found marijuana in the console. He also found several plastic baggies containing a "white powder[y] substance" and large amounts of cash in an open purse on the front passenger floorboard, additional baggies with white powdery substance and the top of a scale with white powder residue in the center console, and a stolen black Sig Sauer 9 millimeter firearm in the glove compartment. Officer Judge then arrested Defendant and took him to the police station. Defendant eventually admitted possessing the firearm and admitted that the cash found in the vehicle—totaling $1,292—came from drug sales.

On 31 July 2017, Defendant was indicted for possession of a stolen firearm, possession of a firearm by a felon, possession with intent to sell or deliver cocaine, possession of less than one-half ounce of marijuana, maintaining a vehicle used to keep and sell cocaine and marijuana, and attaining habitual felon status. On 15 March 2018, Defendant filed a motion to suppress evidence seized as a result of the stop. The motion came on for hearing on 19 March 2018 and Officer Judge was the only testifying witness. After the parties concluded their arguments, the trial court orally denied Defendant's motion, concluding that Officer Judge had formed a reasonable articulable suspicion to justify stopping Defendant. The trial court entered this ruling in a written order on 10 April 2018.

After the trial court denied his motion to suppress, Defendant pled guilty to all charges except those for maintaining a vehicle to keep and sell cocaine and marijuana and possession of less than one-half ounce of marijuana, which were dismissed pursuant to a plea agreement. The trial court consolidated the cocaine and firearms charges into one judgment and sentenced Defendant to the presumptive range of 77 to 105 months' imprisonment, with credit given for 1 day spent in confinement; and ordered him to pay a total of $1,627.50 in restitution and court costs. Defendant filed written notice of appeal on 23 April 2018.[5]

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4. The trial court's findings of fact do not mention that there was a passenger.

5. Defendant did not give oral notice of appeal, as his counsel stipulated to the trial court that, "once the [State] and I have worked out the findings of fact, once [the trial judge]

II. ANALYSIS

A. Jurisdiction

As a preliminary matter, we address whether this Court has jurisdiction to hear Defendant's appeal from the superior court's order denying his motion to suppress.

Upon a guilty plea, a defendant has the right to appeal an order denying a motion to suppress evidence so long as it is "an appeal from a judgment of conviction." N.C. Gen. Stat. § 15A-979(b) (2017). If the defendant merely appeals the denial of his motion, rather than the final judgment, this Court lacks jurisdiction over the appeal. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010) ("Although Defendant preserved his right to appeal by filing his written notice of intent to appeal from the denial of his motion to suppress, he failed to appeal from his final judgment, as required by [Section] 15A-979(b).").

Here, though Defendant timely filed written notice of appeal, the notice, much like in *Miller*, attempts to appeal the trial court's "Order denying his Motion to Suppress Evidence" instead of the judgment underlying his convictions. We thus conclude that Defendant's notice was deficient and he failed to properly preserve his right to appeal.

Nonetheless, we have "the option 'to exercise our discretion to treat [D]efendant's appeal as a petition for certiorari' in order to reach the merits" of his argument. *State v. McNeil*, __ N.C. App. __, __, 822 S.E.2d 317, 321 (2018) (quoting *State v. Phillips*, 149 N.C. App. 310, 314, 560 S.E.2d 852, 855 (2002)) (alterations in original). Therefore, pursuant to N.C. Gen. Stat. § 7A-32(c), we will "treat [D]efendant's appeal as a petition for certiorari and grant the writ to address the merits of this appeal." *Phillips*, 149 N.C. App. at 314, 560 S.E.2d at 855.

B. Reasonable Suspicion for the Traffic Stop

The sole issue on appeal is whether the trial court erred in denying Defendant's motion to suppress evidence resulting from the traffic stop. In reviewing the denial of a defendant's motion to suppress, we "determine whether there was competent evidence to support the trial court's underlying findings of fact" and "whether the findings of fact support the trial court's ultimate conclusions of law." *State v. Fleming*, 106 N.C. App. 165, 168, 415 S.E.2d 782, 784 (1992). We review the trial

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sign[s] it, then we'll give notice of appeal at that time." Defendant only reserved his right to appeal in open court, and the trial court's judgment stated as such.

court's conclusions of law *de novo*, "consider[ing] the matter anew and freely substitut[ing] [our] own judgment for that of the trial court." *State v. Knudsen*, 229 N.C. App. 271, 281, 747 S.E.2d 641, 649 (2013).

Generally, "the United States and North Carolina Constitutions protect an individual against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). In analyzing what constitutes a "reasonable seizure," the United States Supreme Court has consistently held that "a police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968)). Traffic stops are considered seizures " 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Murray*, 192 N.C. App. 684, 687, 666 S.E.2d 205, 207 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979)).

Reasonable suspicion is "based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training."[6] *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). "A court must consider the totality of the circumstances—the whole picture—in determining whether a reasonable suspicion to make an investigatory stop exist[ed]." *State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (quotations and citation omitted). While reasonable suspicion is easier than proving probable cause, "and requires a showing considerably less than preponderance of the evidence," *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (citation and quotation marks omitted), there must be enough suspicion "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979).

Because Defendant does not challenge the trial court's findings of fact, they "are deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d

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6. Our Supreme Court in *State v. Nicholson*, 371 N.C. 284, 293, 813 S.E.2d 840, 846 (2018), recently reemphasized the principle that a police officer's subjective thoughts are irrelevant when reviewing whether reasonable suspicion objectively existed. "Accordingly, we do not consider [Officer Judge's] subjective analysis of the facts as probative of whether those facts—viewed objectively—satisfy the reasonable suspicion standard necessary to support [D]efendant's seizure." *Id.*

733, 735-36 (2004). We need only determine whether the trial court's findings support its conclusion of law that Officer Judge had reasonable suspicion to stop Defendant.

The trial court made the following relevant findings of fact:

> 1. On or about November 25, 2016, Officer Nathan Judge with the Graham Police Department received a call from Communications that a tip came in of a suspicious white male walking around the business of Graham Feed & Seed . . . ;
>
> 2. That the tip also included a suspicious gold or silver vehicle in the parking lot of the business;
>
> 3. That there was no description of what the suspicious activity was and no timeframe as to how long the caller observed this suspicious activity;
>
> 4. That the tip came in around 8:40p.m. at night;
>
> 5. That before Officer Judge arrived to the business, he was familiar with the area and knew that there had been residential break-ins in the area, the business across the street had been broken into, and there had been vandalism in the area;
>
> 6. That the officer did not testify to a specific time frame when the previous break-ins had occurred;
>
> 7. That when Officer Judge arrived, he saw a silver car in the parking lot in front of the business;
>
> 8. That the business was closed and there were no other cars in the parking lot;
>
> 9. That Officer Judge did not see anyone walking around the business and did not see anyone outside of the vehicle;
>
> 10. That the business does not a have a "no trespassing" sign on its premises;
>
> 11. That Officer Judge pulled his vehicle onto the southern part of the parking lot of the Graham Feed & Seed, exited his patrol car, retrieved his flashlight and approached the silver car as the silver car was approaching the roadway, near the exit of the parking lot;
>
> 12. That Officer Judge approached the silver car, shone [sic] a flashlight into the face of the driver, and said "What's up boss man"?;

13. That the windows on the silver car were closed;

14. That Officer Judge could not see inside the silver car except when he shined his flashlight into the face of the driver;

15. That the driver made no acknowledgment of the officer, and left the parking lot of the business;

16. That Officer Judge acknowledged that [Defendant] was not required to stop when the officer approached [D]efendant's vehicle;

17. That Officer Judge was within arm's length of the silver vehicle at this time;

18. That Defendant is a black male;

19. That Officer Judge then followed the silver vehicle because he didn't know what he had;

20. That Officer Judge knew that other officers park their patrol cars in the gravel parking lot after hours for various reasons;

21. That Officer Judge did not know if this vehicle was in the process of turning around in the parking lot;

22. That between the time of following the silver vehicle and before effectuating the stop, Officer Judge did not observe any bad driving, traffic violations, criminal offenses, or furtive movements;

23. That Defendant stopped appropriately when Officer Judge activated his blue lights.

We hold that Officer Judge's justification for conducting the traffic stop of Defendant was nothing more than an "inchoate and unparticularized suspicion or 'hunch.' " *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 7 (1989) (quotation and citations omitted).

"Where the justification for a warrantless stop is information provided by an anonymous informant, a reviewing court must assess whether the tip at issue possessed sufficient indicia of reliability to support the police intrusion on a detainee's constitutional rights." *State v. Johnson*, 204 N.C. App. 259, 263, 693 S.E.2d 711, 715 (2010) (citing *Illinois v. Gates*, 462 U.S. 213, 76 L. E. 2d 527 (1983)). Indices of reliability can come in two forms: (1) the tip itself provides enough detail and information to establish reasonable suspicion, or (2) though the tip lacks independent reliability, it is "buttressed by sufficient police corroboration." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 630 (2000).

Absent corroboration, an anonymous tip rarely supports reasonable suspicion because, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if [the] allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000) (quotations and citations omitted). As stated by our Supreme Court in *Hughes*:

> [A]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Hughes, 353 N.C. at 209, 539 S.E.2d at 632 (quoting *J.L.*, 529 U.S. at 272, 146 L. E. 2d at 261). Consequently:

> The type of detail provided in the [anonymous] tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip.

Johnson, 204 N.C. App. at 264, 693 S.E.2d at 715.

In *Hughes*, police officers received an anonymous tip that a person named "Markie" would be arriving in Jacksonville from New York City by bus around 5:30 pm, possessing marijuana and cocaine. 353 N.C. at 201, 539 S.E.2d at 627. The tip described Markie as a "dark-skinned Jamaican from New York who weighs over three hundred pounds," about "six foot, one inch tall or taller," about 20-30 years old, and would be "clean cut with a short haircut and wearing baggy pants." *Id.* at 201-02, 539 S.E.2d at 627. The informant stated that Markie "sometimes" travelled to Jacksonville on weekends before it got dark, "sometimes" took a taxi from the bus station, "sometimes" had an overnight bag, and "would be headed to North Topsail Beach." *Id.* at 202, 539 S.E.2d at 627. When the officers reached the bus station, they saw a bus from Rocky Mount, rather than New York City, arrive around 3:50 pm. *Id.* The officers saw the defendant, who "matched the exact description [they] had been given and was carrying an overnight bag," not exiting the bus but entering a taxi. The taxi traveled toward a highway intersection where, depending

on which way the taxi turned, would lead to either Wilmington or Topsail Beach. *Id.* at 202, 539 S.E.2d at 628. The officers stopped the taxi before it reached the intersection. *Id.* The *Hughes* court concluded that, "[w]ithout more, these details [were] insufficient corroboration because they could apply to many individuals," as the information was "peppered with uncertainties and generalities." *Id.* at 209, 539 S.E.2d at 632.

In *Johnson*, officers received an anonymous tip that a "black male wearing a white t-shirt and blue shorts was selling illegal narcotics and guns" out of a blue Mitsubishi on a street corner in a local housing community. 204 N.C. App. at 260-61, 693 S.E.2d at 713. The tipster provided a vehicle license plate number, WT 3456, but did not provide a name of the suspect. *Id.* Before the officers arrived at the described location, the tipster called back and informed the officers that the suspect left the area, "but would return shortly." *Id.* at 261, 693 S.E.2d at 713. The officers then stationed themselves near one of the only two entryways into the neighborhood and waited. *Id.* Soon thereafter, the officers saw a blue Mitsubishi, with license plate number WTH 3453, being driven by a black male wearing a white T-shirt. *Id.* Through a plate check, the officers discovered that it was registered to a black male whose driver's license had been suspended. *Id.* An officer stopped the defendant about "100 yards from the original area mentioned in the tip." *Id.* at 261, 693 S.E.2d at 714. We held that the stop was not based on reasonable suspicion because the tip "offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator." *Id.* at 263, 693 S.E.2d at 714-15. Thus, because of "the failure of the officers to corroborate the tip's allegations," it lacked sufficient indicia of reliability to justify the stop. *Id.* at 263, 693 S.E.2d at 715.

The anonymous tip that led Officer Judge to stop Defendant reported no crime and was only partially correct. Although there was in fact a silver car in the business' parking lot around 8:40 pm, the tip also said it could have been gold and there was no white male in the parking lot or in the vehicle. Additionally, not only did the tip provide substantially less detail than the tips in *Hughes* and *Johnson*, it merely described the individual as "suspicious" without any indication as to why, and no information existed as to who the tipster was and what made the tipster reliable. Like in *Hughes* and *Johnson*, "there [is] nothing inherent in the tip itself to allow a court to deem it reliable and to provide [Officer Judge] with the reasonable suspicion necessary to effectuate a stop." *Johnson*, 204 N.C. App. at 264-65, 693 S.E.2d at 716.

The vague tip that led Officer Judge to stop Defendant and the other circumstances in this case are similar to those this Court has previously held were insufficient to support reasonable suspicion for a traffic stop. *Murray*, 192 N.C. App. at 684, 666 S.E.2d at 205; *State v. Chlopek*, 209 N.C. App. 358, 704 S.E.2d 563 (2011). *Murray* arose from the following facts: At around 3:40 am, an officer was performing a property check of an industrial park "as part of a 'problem oriented policing project' . . . following reports of break-ins of vehicles and businesses." 192 N.C. App. at 684, 666 S.E.2d at 206. When the officer rounded one of the buildings, he saw the defendant's car leave an area the officer had already checked. *Id.* at 684-85, 666 S.E.2d at 206. The officer followed the vehicle and made a traffic stop without observing any illegal activity or traffic violation. *Id.* at 685, 666 S.E.2d at 206. Similarly in *Chlopek*, at 12:05 am, officers were in a partially-developed subdivision conducting a separate traffic stop when they noticed the defendant's vehicle heading from the subdivision entrance in the direction of undeveloped lots. 209 N.C. App. at 358-59, 704 S.E.2d at 564. One of the officers thought that the defendant "seemed a little nervous in his manner [in] observing" the officers. *Id.* at 359, 704 S.E.2d at 564. Prior to the unrelated stop, the officers "had been put on notice that there had been a large number of copper thefts from" undeveloped portions of other subdivisions, but had received no such reports for that subdivision. *Id.* When the defendant's vehicle returned to the subdivision entrance, the officers stopped the defendant's car. *Id.*

In both *Murray* and *Chlopek*, we held that officers lacked reasonable suspicion to stop defendants because the majority, if not all, of the trial court's findings related to the mere generalized description of the area. *See Murray*, 192 N.C. App. at 689, 666 S.E.2d at 208 ("Officer Arthur never articulated any specific facts about the vehicle itself . . .; instead, all of the facts relied on by the trial court . . . were general to the area . . . and would justify the stop of *any* vehicle there." (emphasis in original)); *Chlopek*, 209 N.C. App. at 363, 704 S.E.2d at 567 ("[A]s in *Murray*, the facts relied upon by the trial court in concluding that reasonable suspicion existed were general to the area[.]").

Here, much like in *Murray* and *Chlopek*, the trial court's findings of fact concerning Officer Judge's knowledge about criminal activity refer to the area in general and refer to no particularized facts. Officer Judge did not articulate how he was "familiar with the area," how he "knew that there had been residential break-ins," or how much "vandalism" and other crimes had been occurring. The findings also stipulated that there was no "specific time frame [given for] when the previous break-ins had occurred."

Nor can we agree with the State's argument that Officer Judge either corroborated the tip or formed reasonable suspicion of his own accord when he arrived at the parking lot. The State points to factors noted in the trial court's findings that have historically been cited in the totality of the circumstances analysis to support establishment of reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. E. 2d 570, 576 (2000) (high-crime area); *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768 (2009) (unusual hour of the day); *Watkins*, 337 N.C. at 443, 446 S.E.2d at 71 (businesses in vicinity were closed). Although these factors, in other contexts, can help establish reasonable suspicion, they are insufficient given the other circumstances in this case.

The State asserts that Defendant's "nervous conduct" and "unprovoked flight" supported Officer Judge's reasonable suspicion. But the trial court did not make either of those findings, and it is not within the authority of this Court to do so. In resolving a motion to suppress, the trial court "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982). We consider only the "cold, written record" before us. *Id.* at 135, 291 S.E.2d at 620 (quoting *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971)). The trial court's findings speak nothing of Defendant's demeanor—other than his lack of acknowledgement of Officer Judge—or the manner in which Defendant drove and exited the parking lot. The State's argument in this respect is unconvincing.

The State also relies on prior decisions for the general proposition that reasonable suspicion can be based on a suspect's suspicious activities in an area known for criminal activity at an unusual hour. In *State v. Blackstock*, officers were patrolling in an unmarked vehicle as part of a "Crime Abatement Team" in an area where "statistical data indicated [the] area had a problem with robberies and break-in enterings." 165 N.C. App. 50, 53, 598 S.E.2d 412, 414 (2004). Around 11:45 pm, the officers found two men walking along the front of closed businesses in a strip mall. *Id.* The men walked very slowly and kept looking in and out of the businesses' windows. *Id.* at 53, 598 S.E.2d at 415. When a clearly marked police cruiser arrived at the scene, the two men "immediately turned around" and "immediately began to walk hurriedly backward." *Id.* The two men eventually entered a vehicle which was concealed from public view along the perimeter of the strip mall. *Id.* As the officers followed the two men, the vehicle drove slowly through a gas station and a fast-food restaurant parking lot without stopping, while the man in the passenger seat kept looking back at the officers following them. *Id.*

We concluded, based on a litany of factors including that the strip mall had been "targeted by law enforcement officers as a high crime area," the officers had reasonable suspicion to stop the two men. *Id.* at 59, 598 S.E.2d at 418.

In *State v. Butler*, a detective saw the defendant "in the midst of a group of people congregated on a corner known as a 'drug hole,' " where the detective had been conducting "daily surveillance for several months." 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992). The detective had made four to six drug-related arrests on the same corner in the previous six months. *Id.* After the detective and the defendant made eye contact, the defendant "immediately moved away," which the detective construed to indicate flight. *Id.* The detective then stopped the defendant and asked him for his identification. Our Supreme Court concluded that the criminal activity in the area, taken together with the detective's experience and observation of the defendant's reaction to police presence, rendered the stop constitutional. *Id.* at 232, 415 S.E.2d at 721.

In *State v. Fox*, at about 12:50 am, an officer observed the defendant's vehicle travelling down a dead-end street "where several padlocked businesses were located." 58 N.C. App. 692, 692, 294 S.E.2d 410, 411 (1982). The officer knew several break-ins had occurred in the area and had taken a report of a break-in from one of the businesses that evening. *Id.* The officer watched the vehicle stop and turn around, and, when the vehicle was passing the officer's patrol car, the defendant "cocked" his head away. *Id.* The officer stopped the defendant's vehicle absent any observed traffic violations. We held that the officer had reasonable suspicion for the stop. *Id.* at 695, 294 S.E.2d at 413.

In *State v. Tillett*, at approximately 9:40 pm, an officer was patrolling alone in a " 'heavily wooded' area containing summer cottages," with only one of which being occupied at the time. 50 N.C. App. 520, 521, 274 S.E.2d 361, 362 (1981). The officer was aware of frequents reports of "firelighting" deer at that time of year. *Id.* That night, it was raining and the officer was driving down a narrow, one-way dirt road that made it difficult for two vehicles to pass each other. *Id.* The officer spotted a car carrying the defendant and a passenger and "did not observe an inspection sticker on the vehicle." *Id.* The officer did not stop the defendant's car, as it was "his intention [] to allow the vehicle to go to the [lone] occupied dwelling" in the area. *Id.* After the officer continued on for about "fix or six miles," he spotted the defendant's car coming out of the wooded area. The officer then stopped his patrol vehicle in front of the car and put his lights on. *Id.* at 521-22, 274 S.E.2d at 362. We concluded

that, based on the facts found by the trial court, the officer would not have been unreasonable in thinking that the defendant and his passenger were "firelighting" deer or burglarizing the unoccupied homes. *Id.* at 524, 274 S.E.2d at 364.

Unlike the facts in *Blackstock*, *Butler*, *Fox*, and *Tillett*—where the officers were already in areas because they were *specifically* known and had detailed instances of criminal activity—Officer Judge arrived at the parking lot because of a vague tip about an undescribed white male engaged in undescribed suspicious activity in a generalized area known for "residential break-ins" and "vandalism."

The trial court made no findings as to what suspicious activity by Defendant warranted Officer Judge's suspicion. The trial court found that when Officer Judge approached Defendant's car and called out to him, Defendant made "no acknowledgement." Officer Judge admitted at trial that "[D]efendant was not required to stop" when he approached him. While it might seem socially peculiar—possibly uncouth—that someone, like Defendant here, would ignore a police officer's confrontation, such an attempt by Officer Judge at a "consensual encounter" provided Defendant the "liberty 'to disregard [Officer Judge] and go about his business.' " *State v. Sinclair*, 191 N.C. App. 485, 489, 663 S.E.2d 866, 870 (2008) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L.Ed.2d 389, 398 (1991)).

Accordingly, we are unpersuaded by the State's argument and agree with Defendant that the trial court erred in concluding that Officer Judge had reasonable suspicion to stop him. Though the tip did bring Officer Judge to the Graham Feed & Seed parking lot, where he indeed found a silver car in front of the then-closed business with no one else in its vicinity at 8:40 pm, and although Defendant did not stop for or acknowledge Officer Judge, we do not believe these circumstances, taken in their totality, were sufficient to support reasonable suspicion necessary to allow a lawful traffic stop. When coupled with the facts that (1) Defendant was in a parking lot that did "not have a 'no trespassing' sign on its premises"—making it lawful for Defendant to be there; (2) Defendant was not a white male as described in the tip; (3) Defendant's car was possibly in motion when Officer Judge arrived in the parking lot; (4) Defendant had the constitutional freedom to avoid Officer Judge; and (5) Defendant did not commit any traffic violations or act irrationally prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, any criminal activity.

Concluding otherwise would give undue weight to, not only vague anonymous tips, but broad, simplistic descriptions of areas absent specific and articulable detail surrounding a suspect's actions.

REVERSED AND VACATED.

Judges DILLON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
KEITH ALLEN SALTER

No. COA18-747

Filed 2 April 2019

1. Appeal and Error—mootness—sentencing issue

Defendant's appeal from an alleged sentencing error was not moot where, because his probation sentence was automatically stayed pending the appeal, he had not already completed his sentence.

2. Sentencing—prior record level—calculation—stipulation

In a prosecution for misdemeanor stalking, the trial court did not err in sentencing defendant as a Level II offender where he stipulated to his previous conviction of a Class 2 misdemeanor. In effect, defendant stipulated that the facts underlying his prior conviction justified that particular classification; therefore, defendant did not improperly stipulate to a conclusion of law reserved for the trial court, and the trial court was not required to pursue further factual inquiry on the matter.

3. Contempt—criminal—pro se defendant—willfulness—improper closing argument

The trial court properly held a pro se defendant in criminal contempt where defendant willfully behaved in a contemptuous manner by repeatedly raising matters outside the record during his closing argument, contrary to the trial court's multiple warnings over a two-day period.

Appeal by Defendant from Judgment and Order entered 9 August 2017 by Judge Angela B. Puckett in Forsyth County Superior Court. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Keith Allen Salter (Defendant) appeals from (1) his conviction for Misdemeanor Stalking and (2) an Order finding him in criminal contempt. The evidence presented at trial tends to show the following:

On 1 March 2016, Defendant was charged with one count of Misdemeanor Stalking. On 1 April 2016, Forsyth County District Court found Defendant guilty of this offense and entered a suspended sentence. On 5 April 2016, Defendant gave Notice of Appeal to Forsyth County Superior Court, requesting a jury trial.

Defendant was tried *de novo* on the Misdemeanor Stalking charge during the 7 August 2017 Criminal Session of Forsyth County Superior Court. Defendant represented himself *pro se* and did not testify. Throughout the trial, the trial court warned Defendant that he would be held to the same standards as an attorney, given he represented himself *pro se*. On 8 August 2017, the trial court reviewed the closing argument procedures for the next day with Defendant and the State, and the following exchange occurred:

> THE COURT: Okay. All right. Let me talk about the closing arguments. . . .
>
> This will be very important, Mr. Salter, directed mainly to you because you are also the defendant who will be making the closing argument.
>
> THE DEFENDANT: Yes.
>
> THE COURT: You may not -- you chose not to testify. You may not testify, then, through your closing argument. That means you cannot tell the jury, "Here's what I say happened." You can make an argument as to what the evidence showed happened, but you may not testify as you're making that closing argument; does that make sense?
>
> THE DEFENDANT: Yes.

. . . .

THE COURT: So when you are -- I will tell the jury very clearly that you may argue, you may characterize the evidence and attempt to persuade them to a particular verdict, but it would be improper for either side to become abusive, to inject personal experience, to express a personal belief as to the guilt or innocence of the defendant.

Mr. Salter, that makes it tricky for you because you're now not acting as the defendant, you're making a closing argument as a lawyer. So you may argue what the evidence indicates, but again, you may not testify as to what -- to anything outside of what has actually been heard on this witness stand; does that make sense?

THE DEFENDANT: Yes.

THE COURT: Do you understand what I'm saying?

THE DEFENDANT: Yes.

THE COURT: I'm telling you this so that you may prepare your arguments tomorrow. I do not want you to get up here and then me send the jury out and tell you "I'm not going to let you argue that," and you have no idea what you're going to say then. So I'm trying to give you a chance to prepare tonight so that you're able to make an argument tomorrow.

You may, however, give your analysis of the evidence and argue any position or conclusion with respect to any matter at issue.

All right. Do you have any questions, Mr. Salter, about what would be allowed in a closing argument or not allowed.

THE DEFENDANT: No, ma'am. Evidence is allowed, correct?

THE COURT: Anything that has been put into evidence you may refer to, or anything that has been testified to from the witness stand that was admitted into evidence, okay?

Now, something I sustained an objection to, that means it was not admitted into evidence and you cannot argue that; does that make sense?

THE DEFENDANT: Yes.

THE COURT: Any other questions that you wish to ask me about what you will and will not be allowed to argue?

THE DEFENDANT: No, ma'am.

Despite these explicit instructions, Defendant began his closing argument the following day by stating, "Every time you guys left out and went back into that room, I wasn't given an opportunity to present evidence. You haven't seen all the evidence. Every piece of evidence that had, I have on file, is on file but inadmissible." The trial court interrupted Defendant, excused the jury, and gave the following admonishment:

THE COURT: Mr. Salter, I was very clear with you yesterday, that you were not to talk about anything that was not in evidence. You may not then tell the jury that there are things that you didn't get to put in. That is completely improper. If I have to stop you for doing that kind of thing again, I will assume you have nothing left to say to the jury, and we will stop right there.

You may argue -- and I took my time to be very clear so that you could prepare. You may argue anything that is in evidence, what you believe your contention is, but what you may not argue is what took place in this courtroom when the jury was not present; do you understand?

THE DEFENDANT: I understand.

After the jury returned, Defendant again attempted to discuss matters not in evidence, such as his lack of a history of domestic violence, his personal background as a father of three children, and his educational background. The trial court excused the jury for a second time and gave Defendant a final warning.

THE COURT: I will note the jury is outside the presence of the courtroom. Mr. Salter, my patience is wearing thin because I went over this with you repeatedly yesterday. You decided not the [sic] testify, and I indicated to you that you may not testify about things outside of the record in front of the jury. The next time -- listen to me carefully -- that I tell you, I will hold you in contempt, and I will begin contempt proceedings; do you understand me?

THE DEFENDANT: Yes.

> THE COURT: I have indicated to you repeatedly you may not get up and say things outside of the record. You did not testify, so you may not say what your background or what your education is. That's not in record. You may not argue that that letter you didn't write. You may argue that there -- that there may not be evidence, but if there is a letter, you did not testify. You may not avoid cross-examination by testifying in the closing argument. I have been very, very clear, and I took a lot of time yesterday to explain to you what you could not do, and you said you understood; and so far, I have sent the jury out repeatedly because you're doing exactly what I told you not to do. If you violate that again, I will begin contempt proceedings. You may argue any matter that is in the record or any matter that's in evidence. You may not avoid testifying by trying to testify in your closing argument; do you understand what I'm saying to you?
>
> THE DEFENDANT: I can testify -- I can only talk about evidence.
>
> THE COURT: You can talk about -- you may argue that -- you may argue any contention that you have regarding the evidence that was admitted yesterday; anything that was said on the stand, any lack of evidence that you believe wasn't presented, that the State has not met their burden of proof, but you may not testify about things outside of the record; do you understand that?
>
> THE DEFENDANT: Yes.

Upon the jury reentering, Defendant continued his closing argument and stated, "I went to Family Dollar and tried to get the video of us standing in line. They said that is a corporate matter." The trial court *sua sponte* objected to and sustained its objection to this statement, as it concerned matters not in evidence. Defendant's statement served as the basis for the trial court's finding of criminal contempt.

On 9 August 2017, the jury found Defendant guilty of Misdemeanor Stalking. The trial court entered Judgment on the Misdemeanor Stalking charge, imposed a sentence of 75 days imprisonment, suspended that sentence, and placed Defendant on supervised probation for 18 months. In calculating Defendant's prior record level for sentencing, Defendant stipulated both that he had a prior conviction of "No Operator's License" and that this conviction was a Class 2 Misdemeanor.

The same day, the trial court also entered a "Direct Criminal Contempt/Summary Proceedings/Findings and Order" (Criminal Contempt Order), holding Defendant in direct criminal contempt for his testimonial statements made during his closing argument and ordering him to pay a $300.00 fine within 30 days. Specifically, the trial court made the following finding of fact in its Criminal Contempt Order:

> The Court finds beyond a reasonable doubt that during the proceeding the above contemnor willfully behaved in a contemptuous manner, in that the above named contemnor did repeatedly argue to jury matters outside the record and attempt to testify to the jury through his closing argument after choosing not to testify at trial. The court repeatedly told him not to do so both on 8/8/17 and on 8/9/17. The court warned him if he did so again contempt proceedings would begin. The defendant then stated to jury "I went to the Family Dollar and tried to get the video but corporate . . . ." That statement was his testimony attempt again and not in evid[ence].

Appellate Jurisdiction

We note at the outset Defendant's Notices of Appeal from both the Misdemeanor Stalking Judgment and Criminal Contempt Order do not comply with the requirements of Rule 4 of our Rules of Appellate Procedure. On 9 November 2018, Defendant filed a Petition for Writ of *Certiorari* with this Court, seeking review of the Misdemeanor Stalking Judgment and Criminal Contempt Order.

Pursuant to Rule 21(a)(1) of our Appellate Rules, this Court possesses the authority to grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1). This Court has allowed for the issuance of a writ of *certiorari* despite technical defects in a notice of appeal by a *pro se* defendant in a variety of circumstances, especially where the State has not been misled by the mistake. *See, e.g.*, *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) ("[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." (citations, quotation marks, and ellipsis omitted)). Here, the State does not contend it has been misled by Defendant's faulty Notices of Appeal; therefore, in our discretion, we grant Defendant's Petition for Writ of *Certiorari* to review both the Misdemeanor Stalking Judgment and Criminal Contempt Order.

Issues

Defendant raises two issues on appeal. First, Defendant contends the trial court erred in sentencing Defendant as a Level II Offender based on his stipulation that he was previously convicted of a Class 2 Misdemeanor. Second, Defendant asserts the trial court erred in holding Defendant in direct criminal contempt because his statements made during closing arguments were not in willful violation of the trial court's admonishments.

Analysis

I. Sentencing Stipulation

[1] Defendant contends the trial court erred in sentencing Defendant as a Level II Offender based on his stipulation that he was previously convicted of a Class 2 Misdemeanor. We first note the State argues this issue is moot because Defendant could have already completed his sentence, given that over 18 months have passed since Judgment was entered.[1] However, N.C. Gen. Stat. § 15A-1451 provides, "When a defendant has given notice of appeal . . . [p]robation . . . is stayed." N.C. Gen. Stat. § 15A-1451(a)(4) (2017). Because Defendant's sentence of probation was automatically stayed pending appeal, we determine this issue is not moot and therefore address the merits.

[2] A misdemeanor offender's prior record level is "determined by calculating the number of the offender's prior convictions that the court finds to have been proven . . . ." N.C. Gen. Stat. § 15A-1340.21(a) (2017). "In determining the prior conviction level, a prior offense may be included if it is either a felony or a misdemeanor at the time the offense for which the offender is being sentenced is committed." *Id.* § 15A-1340.21(b). A defendant's prior convictions can be proven, *inter alia*, by stipulation of the parties. *Id.* § 15A-1340.21(c)(1).

"While such convictions often effectively constitute a prior record level, a defendant is not bound by a stipulation as to any conclusion of law that is required to be made for the purpose of calculating that level." *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830 (2013) (citations omitted). Our Supreme Court recently addressed whether a defendant can stipulate on his sentencing worksheet that a prior conviction justifies a certain sentencing classification or whether this is a

1. The State concedes it "has been unable to determine whether defendant has completed his sentence of 18 months of supervised probation."

conclusion of law properly left to the trial court. *See State v. Arrington*, 371 N.C. 518, 819 S.E.2d 329 (2018).

In *Arrington*, the defendant entered a plea agreement and stipulated to a sentencing worksheet showing his prior offenses, including a second-degree murder conviction designated as a B1 offense. *Id.* at 519, 819 S.E.2d at 330. The defendant's second-degree murder conviction stemmed from acts committed prior to 1994; however, the Legislature did not divide this crime into two classifications, B1 and B2, until after the defendant's 1994 conviction. *Id.* at 522-25, 819 S.E.2d at 332-34. Thus, the defendant's second-degree murder conviction could have been classified as a B1 or B2 offense, depending on certain factual circumstances existing at the time of the murder; however, the defendant did not explain the factual underpinnings of his conviction and merely stipulated to the B1 classification. *Id.* at 520-21, 819 S.E.2d at 330-31. This Court vacated the trial court's judgment and held that this determination—whether the second-degree murder conviction should be classified as a B1 or B2 offense for sentencing purposes—constituted a legal question to which the defendant could not stipulate. *Id.* at 521, 819 S.E.2d at 331 (citation omitted).

Our Supreme Court reversed this Court, reasoning that "[e]very criminal conviction involves facts (i.e., what actually occurred) and the application of the law to the facts, thus making the conviction a mixed question of fact and law." *Id.* "Consequently, when a defendant stipulates to a prior conviction on a worksheet, the defendant is admitting that certain past conduct constituted a stated criminal offense." *Id.* at 522, 819 S.E.2d at 331. "By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification." *Id.* at 522, 819 S.E.2d at 332. "Thus, like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification." *Id.* at 524, 819 S.E.2d at 333. Our Supreme Court further acknowledged that "[s]tipulations of prior convictions, including the facts underlying a prior offense and the identity of the prior offense itself, are routine[,]" and that because a defendant is "the person most familiar with the facts surrounding his offense, . . . this Court need not require a trial court to pursue further inquiry or make defendant recount the facts during the hearing." *Id.* at 526, 819 S.E.2d at 334 (citation omitted).

Here, Defendant stipulated that his "No Operator's License" conviction was classified as a Class 2 Misdemeanor. However, Defendant contends this stipulation was error because on the date of the current offense, "driving with an expired operator's license was either a Class 3 misdemeanor or an infraction," per N.C. Gen. Stat. § 20-35(a1), (a2). *Compare* N.C. Gen. Stat. § 20-35(a1)(1) (2015) (listing failure to obtain a license before driving a motor vehicle as a Class 3 misdemeanor), *with* N.C. Gen. Stat. § 20-35(a2) (2015) (listing (1) failure to carry a valid license while driving and (2) operating a motor vehicle with an expired license as infractions). However, N.C. Gen. Stat. § 20-35(a) expressly provides that unless another statute controls, "a violation of this Article is a Class 2 misdemeanor . . . ." *Id.* § 20-35(a). For instance, section 20-30 of Article 2[2] sets out a number of acts that could fall within the ambit of "No Operator's License" and would be classified as Class 2 misdemeanors. *See* N.C. Gen. Stat. § 20-30(1)-(5) (2015); *see also* N.C. Gen. Stat. §§ 20-32; -34 (2015).

Defendant, as "the person most familiar with the facts surrounding his offense," stipulated that his "No Operator's License" conviction was a Class 2 Misdemeanor. *Arrington*, 371 N.C. at 526, 819 S.E.2d at 334 (citation omitted). As such, he was "stipulating that the facts underlying his conviction justify that classification." *Id.* at 524, 819 S.E.2d at 333. Further, the trial court was under no duty to "pursue further inquiry or make defendant recount the facts during the hearing." *Id.* at 526, 819 S.E.2d at 334 (citation omitted). Therefore, under *Arrington*, we conclude there was no error in the trial court's sentencing calculation.

II. Criminal Contempt Order

A. Standard of Review

[3] In criminal contempt proceedings, our standard of review is limited to determining

> whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. The trial court's conclusions of law drawn from the findings of fact are reviewable de novo.

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2. Article 2 of Chapter 20 of our General Statutes is the Uniform Driver's License Act. *See* N.C. Gen. Stat. § 20-5 (2017).

State v. Simon, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007) (citations and quotation marks omitted).

B. Willfulness

N.C. Gen. Stat. § 5A-11 provides a list of conduct that constitutes criminal contempt. N.C. Gen. Stat. § 5A-11(a)(1)-(10) (2017). The trial court did not specify which subsection applies; however, based on the trial court's oral rendering of criminal contempt, it is evident the trial court based its Criminal Contempt Order on sections 5A-11(a)(1), (2), and (3), which state that criminal contempt is

> [w]illful behavior committed during the sitting of a court and directly tending to interrupt its proceedings[, w]illful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority[, and w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

Id. § 5A-11(a)(1)-(3).

Direct criminal contempt occurs when the act "(1) [i]s committed within the sight or hearing of a presiding judicial official; and (2) [i]s committed in, or in immediate proximity to, the room where proceedings are being held before the court; and (3) [i]s likely to interrupt or interfere with matters then before the court." N.C. Gen. Stat. § 5A-13(a) (2017). Section 5A-14 of our General Statutes allows a judge to "summarily impose measures in response to direct criminal contempt[.]" N.C. Gen. Stat. § 5A-14(a) (2017).

Defendant challenges the trial court's factual finding that he "willfully behaved in a contemptuous manner" by arguing matters outside the record and attempting to testify during his closing argument. Specifically, Defendant contends his actions were not willful within the meaning of the criminal contempt statute and willfulness must be considered in the context of Defendant's lack of legal knowledge or training.

As used in the criminal contempt statute, "willfulness" means an act "done deliberately and purposefully in violation of law, and without authority, justification or excuse." *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987) (citations omitted). The term implies the act is done knowingly and of stubborn purpose or resistance. *McKillop v. Onslow Cty.*, 139 N.C. App. 53, 61-62, 532 S.E.2d 594, 600 (2000) (citations omitted). Willfulness also connotes a "bad faith disregard for

authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983) (citations omitted).

Here, the Record shows the trial court repeatedly instructed Defendant that he could not testify to matters outside the record during his closing arguments, given that Defendant chose not to testify at trial. On 8 August 2017, the trial court reviewed the closing argument procedures for the following day with Defendant and stressed to Defendant that he could not testify during his closing argument, explaining "[t]hat means you cannot tell the jury, 'Here's what I say happened.' " Defendant stated he understood the trial court's instruction five separate times during the course of the instructions.

However, the next day, Defendant began his closing argument by attempting to tell the jury about evidence he acknowledged was "inadmissible." Upon hearing Defendant attempting to testify during his closing argument, the trial court excused the jury and admonished Defendant "not to talk about anything that was not in evidence." After the trial court explained to Defendant what he could and could not discuss, Defendant told the trial court he understood its instructions.

Once the jury returned, however, Defendant again attempted to discuss matters not in evidence. With the trial court's patience "wearing thin," the trial court excused the jury for a second time and gave Defendant a final warning. The trial court stressed it would not allow Defendant to "avoid cross-examination by testifying in the closing argument" and warned Defendant if he attempted to testify to matters outside of the record, the trial court would begin criminal contempt proceedings. Once again, Defendant informed the trial court he understood its warnings.

Thereafter, the jury returned, and Defendant continued his closing argument by stating, "I went to Family Dollar and tried to get the video of us standing in line. They said that is a corporate matter." This statement by Defendant concerned matters not in evidence and served as the basis for the trial court's finding of criminal contempt.

The transcript of Defendant's closing argument constitutes competent evidence to support the trial court's finding that Defendant acted willfully in repeatedly violating the trial court's instructions. Although Defendant claims the evidence suggests his testimony was the product of ignorance rather than willfulness, we are bound by the trial court's finding of fact. *See Simon*, 185 N.C. App. at 250, 648 S.E.2d at 855 ("Findings of fact are binding on appeal if there is competent evidence to support them, *even if there is evidence to the contrary*." (emphasis added)

(citation and quotation marks omitted)). Therefore, the trial court's conclusion of law that Defendant was "in [direct criminal] contempt of court" is likewise supported by this finding of fact that Defendant repeatedly argued matters outside the record during closing argument, despite the trial court's repeated instructions and admonishments over a two day period. Consequently, we affirm the Criminal Contempt Order.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in the trial court's Misdemeanor Stalking Judgment. We also affirm the trial court's Criminal Contempt Order.

NO ERROR IN PART; AFFIRMED IN PART.

Judges ZACHARY and BERGER concur.

LEANNE MICHELLE WISE, PLAINTIFF
v.
ROBERT JOHN WISE, DEFENDANT

No. COA18-858

Filed 2 April 2019

1. Divorce—alimony—net income—mandatory retirement deduction—differential treatment of health insurance premiums

The trial court abused its discretion in calculating a husband's net income for determining alimony where it failed to account for a mandatory retirement deduction from defendant's paycheck. The trial court further abused its discretion by treating the wife's health insurance premium as a reasonable living expensive but failing to treat the husband's in the same way.

2. Divorce—alimony—child support—business income—prior years—sufficiency of findings

The trial court's findings regarding a husband's reported business income—that he reported a monthly loss of approximately $2,500 and that this report was not credible—supported the trial court's decision to use income from the business's prior years to calculate the husband's gross income for the determinations of alimony and child support. However, on remand, the trial court was

instructed to make additional findings to support its decision to use the average income from the most recent two years.

3. Divorce—alimony—net income—living expenses—categorized as business expenses—double dipping

The trial court did not err by excluding a husband's personal expenses from his living expenses where the husband categorized those personal expenses as business expenses. To do otherwise would result in "double dipping."

4. Divorce—alimony—amount and duration—sufficiency of findings—speculation as to rationale

The trial court erred by failing to make sufficient findings to support the amount and duration of an alimony award to plaintiff-wife. The Court of Appeals rejected as mere speculation the wife's argument that the trial court's rationale was apparent from the parties' agreement that she would stay home with the children until they were enrolled in school and from the range of defendant's excess income and plaintiff's income shortfall.

5. Attorney Fees—alimony and child support action—sufficiency of findings—reasonableness determination

An award of attorney fees in an alimony and child support action was remanded for additional findings where the trial court failed to make findings regarding the nature and scope of legal services rendered from which to base a reasonableness determination and whether the fees actually incurred were reasonable.

Appeal by defendant from order entered 5 February 2018 by Judge Meredith A. Shuford in Lincoln County District Court. Heard in the Court of Appeals 30 January 2019.

Horn, Pack, Brown & Dow, P.A., by Carol Walsburger Dow, for plaintiff-appellee.

The Jonas Law Firm, P.L.L.C., by Rebecca J. Yoder, for defendant-appellant.

ARROWOOD, Judge.

Robert John Wise ("defendant") appeals from child support and alimony order in favor of his ex-wife, LeAnne Michelle Wise ("plaintiff"). For the following reasons, we reverse and remand to the trial court.

I. Background

Plaintiff and defendant were married on 19 September 2009 and had two children during their marriage in November 2010 and September 2015. The parties separated on 6 June 2017. On 12 July 2017, plaintiff filed a complaint seeking child custody, child support, equitable distribution, divorce from bed and board, and post-separation support and alimony. Both plaintiff and defendant filed financial affidavits subsequent to the filing of the complaint. On 7 September 2017, defendant filed an answer, defenses, and counterclaims seeking child custody and equitable distribution.

For the benefit of their children, the parties entered into a parenting agreement, which was signed by defendant on 7 September 2017 and by plaintiff on 18 September 2017. The parties then entered into a consent order that was filed 18 October 2017. The consent order resolved child custody in accordance with the terms of the parenting agreement and required defendant to pay temporary child support in the amount of $1,376.07 per month and post-separation support in the amount of $300.00 per month. The consent order also appointed a mediator to address issues of alimony, permanent child support, and equitable distribution. During a mediation on 1 November 2017, the parties came to an agreement on equitable distribution and a mediated settlement agreement was filed on 2 November 2017. The parties were unable to reach an agreement on alimony and permanent child support.

In December 2017 and early January 2018, the parties filed amended financial affidavits. On 10 January 2018, plaintiff's attorney filed an affidavit of attorney fees and court costs.

The issues of alimony and child support were heard by Judge Meredith A. Shuford in Lincoln County District Court on 10 and 11 February 2018. The trial court took the matter under advisement, and later filed an order on 5 February 2018. The trial court ordered defendant to pay child support in the amount of $1,551.24 per month and ordered defendant to pay alimony until 1 September 2021 in the amount of $1,850.00 per month. Defendant filed notice of appeal from the order on 28 February 2018.

II. Discussion

On appeal, defendant challenges the trial court's award of alimony, child support, and attorney's fees. We address the issues in the order they are raised.

1. Alimony and Child Support

"The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in the absence of an abuse of discretion." *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982) (citing *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966)).

> In determining the amount of alimony the trial judge must follow the requirements of the applicable statutes. Consideration must be given to the needs of the dependent spouse, but the estates and earnings of both spouses must be considered. "It is a question of fairness and justice to all parties."

Id. (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)).

> A trial court's award of alimony is addressed in N.C. Gen. Stat. § 50-16.3A . . . , which provides in pertinent part that in "determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors" including, *inter alia*, the following: marital misconduct of either spouse; the relative earnings and earning capacities of the spouses; the ages of the spouses; the amount and sources of earned and unearned income of both spouses; the duration of the marriage; the extent to which the earning power, expenses, or financial obligations of a spouse are affected by the spouse's serving as custodian of a minor child; the standard of living of the spouses during the marriage; the assets, liabilities, and debt service requirements of the spouses, including legal obligations of support; and the relative needs of the spouses.

Hartsell v. Hartsell, 189 N.C. App. 65, 69, 657 S.E.2d 724, 727 (2008) (quoting N.C. Gen. Stat. § 50-16.3A (2017)).

Child support is governed by N.C. Gen. Stat. § 50-13.4. This Court has explained that "[t]he ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the [obligor] to meet the needs." *Smith v. Smith*, 247 N.C. App. 135, 150, 786 S.E.2d 12, 25 (2016) (quotation marks and citations omitted). Like the determination of the amount of alimony, "[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002).

"A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Moreover, for both alimony and child support, the trial court is required to make findings of fact and conclusions of law. *See* N.C. Gen. Stat. § 50-16.3A; N.C. Gen. Stat. § 50-13.4 (2017). To support the trial court's award of alimony and child support, the trial court's findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court's award. *See Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) ("The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award. In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings.") (quotation marks and citations omitted); *Plott v. Plott*, 313 N.C. 63, 68-69, 326 S.E.2d 863, 867 (1985) (Explaining that for an award of child support pursuant to N.C. Gen. Stat. § 50-13.4, specific findings are necessary to allow an appellate court to determine if the trial court's order is sufficiently supported by competent evidence.)

Gross and Net Income Calculations

Defendant makes various arguments that the trial court erred in awarding child support and alimony because it erred in calculating his gross and net incomes.

In the order, the trial court made the following findings showing its considerations in calculating defendant's gross and net incomes:

> 25. The defendant's total gross income for calculation of child support should include his salary from CMPD ($7,171.97), his average off duty wages ($1[,]870.00) and his average income from his business, Wiseguys ($212.00) for a total of $9[,]253.97.
>
> . . . .
>
> 33. For calculation of alimony, the court finds the defendant's gross income from his employment with CMPD, off duty work and Wiseguys is $9,253.97. The court

> considered the defendant's withholdings for his taxes in the amount of $1[,]452.00 and his monthly child support obligation of $1,551.24, where he received credit for the medical insurance withheld for the children. The 401(k) loan is related to his business. The defendant has approximate net income of $5,690.00 and approximate monthly living expenses of $3,600.00. He has the ability to provide support for the plaintiff.

Based on these findings, the trial court concluded in conclusions of law numbers 2 and 7 that defendant "has the present financial ability and duty to contribute to the support and maintenance of the children" and "has the ability to provide spousal support to . . . [p]laintiff." The trial court ordered defendant to make child support payments in the amount of $1,551.24 per month, to continue to provide hospital and health insurance for the children and pay 100% of uninsured health costs, and to pay alimony in the amount of $1,850.00 per month, beginning 15 February 2018 and continuing until 1 September 2021.

[1] The first issue raised by defendant concerns the trial court's calculation of net income for purposes of determining alimony. Defendant contends the trial court erred in calculating net income by disregarding mandatory deductions from his CMPD paycheck totaling over $900.00 per month. Those alleged mandatory monthly deductions not included in the trial court's calculation are $429.97 for law enforcement officer retirement ("LEO retirement") and $509.35 for defendant's portion of the health insurance premium.

Defendant asserts, and the record shows, that he brought these deductions to the trial judge's attention when the court sought comment on a proposed order. In response to defendant's request that the trial court correct finding of fact number 33 to account for the deductions for LEO retirement and his portion of the health insurance premium, the trial court replied that, "[a]s to #33, the court 'considered' the deductions totaling $1[,]452[.00] (all of the taxes). I addressed the health insurance. I did not consider the LEO deduction or any other voluntary deductions."

It is evident from a review of finding of fact number 33 that the trial court did not account for the LEO retirement or defendant's portion of the health insurance premium in the calculations of defendant's net income. Defendant now asserts that the trial court's disregard for these mandatory deductions was an abuse of discretion that resulted in the overstatement of his net income, which in turn influences the determination of his ability to pay alimony.

Plaintiff responds to defendant's assertion by arguing the trial court did not disregard the alleged mandatory deductions. Plaintiff contends the trial court considered the deductions, chose not to factor them into the net income calculation, and it was within the trial court's discretion to do so because "the trial judge is not bound by the financial assertions of the parties and may resort to common sense and every-day experiences." *Bookholt v. Bookholt*, 136 N.C. App. 247, 251, 523 S.E.2d 729, 732 (1999). Furthermore, plaintiff notes that the trial court "is not required to make findings about the weight and credibility it assigns to the evidence before it." *Hartsell*, 189 N.C. App. at 75, 657 S.E.2d at 730.

Plaintiff is correct that "[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982). However, in regards to the LEO retirement, the issue is not whether it was a reasonable need or expense, but whether it was a mandatory deduction from defendant's CMPD income. The undisputed evidence in the record is that the LEO retirement was a mandatory deduction. Specifically, in response to plaintiff's counsel's examination of defendant concerning deductions listed in defendant's financial affidavit, defendant testified, "[t]he LEO is a mandatory retirement that's taken out of my check that's not voluntary." Upon further questioning, defendant again reiterated that the LEO retirement was mandatory and plaintiff's counsel, seeming to accept defendant's testimony, responded, "[m]andatory, okay, don't give me that one." Although it is the trial court's role to weigh the evidence, the undisputed evidence in this case is that the LEO retirement was a mandatory deduction from defendant's CMPD income.

It is not clear from the trial court's response to defendant, "I did not consider the LEO deduction or any other voluntary deductions[,]" whether the trial court was aware the LEO retirement was a mandatory deduction and did not factor it into the net income calculations, or whether the trial court mistakenly believed it was voluntary and determined it was improper to factor into the calculations. Regardless, we hold either was an abuse of discretion where the record evidence was that the LEO was a mandatory deduction from defendant's CMPD income, making that portion of defendant's CMPD income unavailable to defendant to pay towards alimony. The trial court should have accounted for this mandatory deduction it its calculation of defendant's net income.

The evidence regarding defendant's portion of the medical insurance premium is not as straight forward as the evidence of the LEO retirement. In defendant's financial affidavit, defendant claimed a deduction from his income of $710.85 for medical insurance. Defendant testified that this deduction for medical insurance included the cost of health insurance for himself, plaintiff, their children, and his older daughter from a previous marriage. The evidence was that the insurance premium to cover children was the same whether there was one child or 50 children. Defendant specifically identified, both in his testimony and in his financial affidavit, that the portion of the claimed deduction to cover the cost of health insurance for the children was $201.50. The trial court accepted the evidence of the cost of health insurance attributed to the children and found in finding of fact number 27 that "defendant pays health insurance for the children in the amount of $201.50 per month." The trial court additionally found in finding of fact number 33 regarding net income that it "considered . . . [defendant's] monthly child support obligation of $1,551.24, where he received credit for the medical insurance withheld for the children."

The evidence was that the remaining $509.35 claimed by defendant as a deduction for medical insurance covered the health insurance premium for plaintiff and defendant. Defendant testified that he had the monthly total for the health insurance deduction, but did not "have the breakdown for spouse or employee, children." The reason the portion of the health insurance premium attributed to the children was designated was because defendant calculated it for child support purposes. Despite the evidence that plaintiff was covered by defendant's health insurance, defendant acknowledged that plaintiff would not be covered by defendant's health insurance after the divorce. The trial court specifically found in finding of fact number 17 that "[o]nce the divorce is final, [plaintiff] will have no health insurance."

As noted above, in response to defendant's request that the trial court correct finding of fact number 33 to account for his portion of the health insurance premium, the trial court responded, "I addressed the health insurance." However, there are no findings of fact regarding the remaining $509.35 that defendant claimed as a deduction for medical insurance, and there is no indication that the trial court accounted for the cost of defendant's health insurance premium either as a deduction from his income or as a personal expense.

The trial court did, however, find in finding of fact number 17 that "[plaintiff] plans to obtain coverage through Blue Cross in the approximate amount of $630[.00] per month." The trial court additionally found

in finding of fact number 20 that "[w]hile [plaintiff] is residing with her parents and included under defendant's insurance, her actual living expenses are approximately $1[,]100.00. She anticipates incurring living expenses of $5,350.00 per month to live independently and provide herself with health insurance."

In *Bryant v. Bryant*, 139 N.C. App. 615, 534 S.E.2d 230 (2000), this Court addressed the trial court's characterization of investment income as a reasonable expense. This Court acknowledged that " '[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves[.]' " 139 N.C. App. at 618-19, 534 S.E.2d at 232 (quoting *Whedon*, 58 N.C. App. at 529, 294 S.E.2d at 32). Nevertheless, this Court found "the trial court's inclusion of this investment income amount as an expense for the plaintiff but not for the defendant constituted an abuse of discretion." *Id.* at 619, 534 S.E.2d at 233. This court explained that "[i]t [was] not logical that the trial court could properly characterize [the] investment income, earned and reinvested during the course of the marriage, as an expense for one spouse but not for the other." *Id.*

The same reasoning applies to the consideration of expenses for health insurance. Ordinarily, if the trial court considers the cost of health insurance for one party as a reasonable living expense, it would be an abuse of the trial court's discretion not to consider the other party's cost for health insurance similarly. Here, the trial court should have considered defendant's portion of the health insurance premium as a reasonable living expense, just as the court did with plaintiff's health insurance expense. We do not, however, hold that the entire $509.35 difference between the $710.85 deduction for medical insurance claimed by defendant and the $201.50 portion of that deduction attributed to the children's health insurance premium should be considered by the trial court. Although defendant testified that he did not calculate his own portion of the health insurance premium, the documentary exhibits in the record include the 2018 medical insurance rates that were used to calculate the children's portion of the health insurance premium in a plan covering only defendant and his children. Those 2018 rates show that defendant's portion of the health insurance premium would be approximately $59.06 per month. The trial court abused its discretion in not accounting for defendant's portion of the health insurance premium in calculating his net income.

Because the deduction for the LEO retirement was mandatory and those funds were not available to defendant to pay alimony, we hold the trial court's failure to account for the mandatory deduction was not supported by reason and amounted to an abuse of discretion. At the very least, the trial court must make further findings setting forth the reasons why the LEO retirement was not factored into its calculations. Without such findings, this Court is unable to think of any reason why the LEO retirement should not be included in the net income calculations. Additionally, the differential treatment of plaintiff's and defendant's health insurance costs amounted to an abuse of discretion. Upon remand, the trial court should make additional findings as to defendant's portion of the health insurance premium and account for those reasonable expenses in the calculation of defendant's net income.

[2] The second issue raised regarding the trial court's calculations of defendant's gross income and net income concerns the trial court's calculation of defendant's income from his business, Wiseguys. In finding of fact number 25, the trial court included $212.00 as defendant's average income from Wiseguys in the calculation of defendant's total gross income. That total gross income, including the Wiseguys income, was then referenced in the calculations of net income in finding of fact number 33. The trial court explained how it calculated defendant's income from Wiseguys in the following relevant findings:

> 7. The defendant also owns a business, Wiseguys Used Emergency Equipment. He is a sole owner. The business has been in operation since 2001. The defendant's account [sic] testified regarding the tax returns he has prepared for the business and the parties individual returns.
>
> 8. The defendant reports a monthly loss for the business of $2,479.85 on his financial affidavit. This is not credible. The court reviewed the business tax returns for 2015 and 2016. The returns include reported gains and losses for [years] since 2001. There have been large fluctuations from year to year based upon the nature of the business. The average gains and losses since 2001 equal a gain of $1,419.27 per year ($118.27 per month). The average for 2015 and 2016 is $2,538.00 per year ($211.50 per month).

It is evident from these findings and finding of fact number 25 that the trial court considered the average monthly income from 2015 and 2016,

rounded up to the dollar, in determining defendant's average income from Wiseguys.

Defendant takes issue with the trial court's calculations of his income from Wiseguys based on income from previous years instead of evidence of present income. Defendant acknowledges that past income can be considered in certain circumstances, but contends the trial court failed to make the necessary findings explaining why the evidence of present income from Wiseguys was not reliable.

This court has explained that " '[a]limony is ordinarily determined by a party's *actual* income, from all sources, at the time of the order.' " *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (quoting *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998)). "Similarly, in general, 'a party's ability to pay child support is determined by that party's actual income at the time the award is made.' " *Burger v. Burger*, __ N.C. App. __, __, 790 S.E.2d 683, 686 (2016) (quoting *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006)). Yet, there are exceptions to these rules. The trial court may base an alimony or child support obligation on earning capacity rather than actual income if the trial court finds that the party has depressed income in bad faith. *Id.* at __, 790 S.E.2d at 686 (citing *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219; *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836. This Court has also allowed the trial court to average prior years' incomes in cases where the trial court found the evidence of actual income is unreliable or otherwise insufficient. *See Diehl v. Diehl*, 177 N.C. App. 642, 649-50, 630 S.E.2d 25, 30 (2006); *Zurosky v. Shaffer*, 236 N.C. App. 219, 242-43, 763 S.E.2d 755, 769-70 (2014).

In *Diehl*, the plaintiff "challenge[d] the trial court's use of an average of his monthly gross incomes in 2001 and 2002 as a basis for finding his monthly gross income from 2003 . . . ." 177 N.C. App. at 649, 630 S.E.2d at 30. This Court noted the trial court's findings that the evidence presented of actual income was unreliable were supported by the evidence and held that, "[g]iven the unreliability of [the plaintiff's] documentation, we cannot conclude . . . that the trial court abused its discretion by averaging . . . income from . . . two prior tax returns to arrive at his 2003 income." *Id.* at 650, 630 S.E.2d at 30. This Court also disagreed with the plaintiff's characterization of the trial court's methodology of averaging prior years' incomes as "imputation" of income and held the law of imputation of income was inapplicable. *Id.* Thus, the trial court did not need to find bad faith. *Id.*

In *Zurosky*, this Court noted the difference between those cases where the trial court may impute income when a party acts in bad faith

to depress their income and cases where the reported income was unreliable, explaining that "[i]n *Diehl* . . ., the trial court did not make a finding of bad faith or have evidence that the spouse deliberately depressed his income; the trial court used prior years' incomes because the trial court did not have sufficient evidence regarding his actual income." 236 N.C. App. at 243, 763 S.E.2d at 769. This Court held *Zurosky* was analogous to *Diehl* in that there were concerns over the reliability of the reported income; thus, this Court held the trial court did not abuse its discretion in using prior years' income to determine alimony and child support. *Id.* at 243-44, 763 S.E.2d at 769-70.

Defendant acknowledges *Diehl* and *Zurosky*, but contends the trial court did not make the necessary findings in this case. Defendant relies on *Green v. Green*, __ N.C. App. __, 806 S.E.2d 45 (2017), in which this Court distinguished *Diehl* and *Zurosky*, explaining that "the trial court did not make findings of fact as to whether [the d]efendant's professed actual income at the time of the order was reliable or unreliable before basing its decision regarding [the d]efendant's ability to pay alimony on an average of prior years' income." __ N.C. App. at __, 806 S.E.2d at 55. This Court held "the trial court abused its discretion in basing its decision regarding [the d]efendant's ability to pay alimony on an average of [the d]efendant's monthly gross income from prior years without first determining [the d]efendant's current monthly income, and whether that reported current income was credible." *Id.* at __, 806 S.E.2d at 55-56.

As stated above, in this case the trial court found in finding of fact number 8 that "[t]he defendant reports a monthly loss for the business of $2,479.85 on his financial affidavit." The trial court then additionally found in finding of fact number 8 that defendant's reported income "is not credible." These are the precise findings that this Court stated were necessary in *Green*. Nevertheless, defendant contends the trial court's bare statement that defendant's evidence is not credible is inadequate absent additional findings explaining the court's concerns over the reliability of defendant's evidence. Although we do not think such additional findings are required, we note that the trial court additionally found in finding of fact number 8 that it was concerned with defendant's evidence of actual income because "[t]here have been large fluctuations form year to year based upon the nature of the business." Thus, the trial court questioned whether the defendant's reported income accurately represented his income from Wiseguys. The evidence in the record supports the trial court's findings; therefore, we cannot say the trial court abused its discretion. Like in *Diehl* and *Zurosky*, we hold the trial court's findings in this case support its decision to use prior years' income from Wiseguys

in the calculation of gross income for the determinations of alimony and child support.

Furthermore, this Court has afforded the trial court discretion in selecting the number of prior years' income it considers. For example, the trial court considered the most recent two years in *Diehl*, 177 N.C. App. at 650-51, 630 S.E.2d at 30-31, and considered prior income over a longer span in *Zurosky*, 236 N.C. App. at 243, 763 S.E.2d at 770. In both instances, this Court held the trial court's decision to consider prior income was rational and the trial court did not abuse its discretion in doing so.

The trial court's decision in this case to consider only the income from the most recent two years, for which the business tax returns of Wiseguys were introduced into evidence, may be a proper exercise of the trial court's discretion. This Court, however, cannot make that determination without additional findings setting forth the trial court's reasons for choosing two years as its measure of time as opposed to the longer period for which it also calculated average income. Given the difference in the average income for the different time spans in finding of fact number 8, upon remand, the trial court should make additional findings to support its decision to use the average income from Wiseguys from the most recent two years in its determination of business income.

[3] Defendant's third challenge to the trial court's calculation of net income is the trial court's alleged disregard for approximately $1,000.00 of personal expenses that defendant included as business expenses for Wiseguys. Defendant asserts that those personal expenses include, *inter alia*, uninsured medical expenses, a cell phone, and vehicle expenses. Defendant contends that those personal expenses were included in the reported business loss from Wiseguys, but when the trial court used the prior years' income instead of the reported business loss to determine his income from Wiseguys, the trial court failed to account for these personal expenses elsewhere in the net income calculations. Defendant argues the trial court should have considered the expenses separately in the calculation of business income as a deduction, or in the calculation of defendant's individual monthly expenses. We are not convinced the trial court erred.

It is evident that the trial court considered these personal expenses. The trial court explicitly acknowledged the expenses in finding of fact number 9, when it found as follows:

> 9. The defendant pays multiple personal expenses from the business such as uninsured health expenses such

> as co-pays and prescriptions, his cellular phone, automobile expenses, and meals. He receives a benefit of approximately $1,000[.00] per month for these personal expenses.

Defendant's testimony was that he did not include these expenses in his financial affidavit because they were included as business expenses for Wiseguys and included in the reported business loss. Defendant contends that he purposefully did not include them in both the reported business loss and as personal expenses to avoid "double dipping."

While taking no position on the correct classification of these expenses, we agree with defendant that it was proper not to include them as both business expenses and personal expenses. However, we disagree that the trial court erred by not accounting for these expenses as living expenses in finding of fact number 23, in which the trial court found "defendant has living expenses of approximately $3,600.00 per month[,]" after the trial court refused to accept defendant's reported business loss for Wiseguys.

As stated above, the trial court calculated defendant's monthly income from Wiseguys based on prior years' income. The prior years' income was calculated from information included in the business tax returns for Wiseguys for 2015 and 2016. Those tax returns include as business deductions expenses similar to those defendant now claims the trial court failed to address separately. Because the personal expenses were included as business deductions and accounted for in the business tax returns used to determine defendant's income from Wiseguys, the trial court did not err in excluding them from the living expenses considered in finding of fact number 23. Including them as separate living expenses after they were considered in determining income from Wiseguys would result in "double dipping."

Defendant's final argument regarding the trial court's calculation of gross income and net income is that the trial court erred in the amount of alimony it awarded. Defendant contends the trial court's alimony award renders him unable to pay child support and reasonable monthly expenses. While we do not agree with all of defendant's adjustments for the errors alleged on appeal, we hold the trial court must revisit its calculations of gross income and net income used to determine child support and alimony. In summary, trial court should make additional findings to support its determination of defendant's business income from Wiseguys, which is used to calculate gross income and determine defendant's child support obligation. The trial court should also make

additional findings to account for defendant's mandatory LEO retirement deduction and defendant's reasonable health insurance expenses in the calculation of defendant's net income for purposes of determining alimony.

Amount and Duration of Alimony

[4] Defendant also contends the trial court erred in its award of alimony because it did not make sufficient findings of fact to support the amount and duration of the award. Specifically, defendant argues "[t]he order on appeal lacks any findings setting forth the reasons alimony was awarded at a rate of $1,850.00 per month for a term of forty-four months." Defendant asserts that this deficiency illustrates the lack of detailed findings throughout the order.

N.C. Gen. Stat. § 50-16.3A requires the trial court to make findings of fact supporting an award of alimony and specifically mandates that "[t]he court shall set forth . . ., if making an award, the reasons for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50-16.3A(c). "It is well-established by this Court that 'a trial court's failure to make *any* findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c).' " *Ellis v. Ellis*, 238 N.C. App. 239, 242, 767 S.E.2d 413, 415-16 (2014) (quoting *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522-23 (2003)) (emphasis in original). This Court has explained that "the findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case." *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794 (footnote omitted), *affirmed per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).

It is telling that plaintiff does not point to findings clearly setting forth the reasons for the amount or duration of the trial court's alimony award. A review of the order reveals that the trial court did not make any such findings.

Despite the plain language of N.C. Gen. Stat. § 50-16.3A(c), plaintiff contends that it is sufficient that the trial court's reasoning can be derived from its findings. In support of her argument, plaintiff cites this Court's unpublished opinion in *Dorwani v. Dorwani*, 214 N.C. App. 560, 714 S.E.2d 868 (2011) (unpub.), which is not controlling legal authority. *See* N.C.R. App. P. 30(e)(3) (2019) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.") In *Dorwani*, this Court upheld the trial court's award of

alimony for the life of the plaintiff because "the trial court's rationale for awarding alimony for an indefinite term [was] obvious" from consideration of the unchallenged findings. *Id.* at *3.

Here, although plaintiff identifies the trial court's findings that plaintiff was a homemaker and the primary caretaker of their seven-year-old and sixteen-month-old children, the parties agreed plaintiff would stay home with the children until at least the time they were both in school in 2020, plaintiff is enrolled in school to obtain a degree in Business Administrative that she expects to complete in 2019, plaintiff has been out of the workforce for nine years, plaintiff anticipates living expenses of $5,350.00, and defendant has net income of approximately $5,690.00 and living expenses of approximately $3,600.00, these findings do not set forth the reasons for the precise amount or duration of the trial court's alimony award. Plaintiff asserts the trial court's rationale is apparent because the forty four month duration is within the timeframe that allows plaintiff to seek employment once the children are both enrolled in school and because the amount of $1,850.00 per month is within the range of defendant's excess income and plaintiff's income shortfall. Plaintiff's assertions, however feasible, are merely conjecture.

This Court does not rely on speculation. The trial court must make sufficient findings to allow this Court to perform a meaningful review. Because the trial court did not set forth its reasons for the amount and duration of its alimony award, we must remand for further findings. *See Hartsell*, 189 N.C. App. at 75-76, 657 S.E.2d at 730-31 (citing *Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000), *Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003), and *Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006)).

2. Attorney's Fees

[5] Lastly, defendant challenges the trial court's award of attorney's fees in favor of plaintiff on the basis that the trial court failed to make sufficient findings of fact to support the award. We agree additional findings are necessary.

Plaintiff requested attorney's fees and costs in the complaint and, on 10 January 2018, plaintiff's attorney filed an affidavit of fees and court costs.

After plaintiff and defendant presented arguments on attorney's fees, the trial court issued the following pertinent findings of fact:

> 34. In the Equitable Distribution Order, the defendant was ordered to pay a distributive award to the plaintiff in excess of $4,000.00. The [p]laintiff has used the

award and her share of the marital assets she previously withdrew from joint accounts to pay her living expenses and attorney's fees. It has been necessary for the plaintiff to depend on support from her parents and deplete her share of the marital estate to meet her monthly living expenses.

35. The plaintiff has insufficient means to subsist during the prosecution of this action and to defray the necessary legal expenses thereof. She relied on her parents to pay her legal fees as well as a monetary award from the equitable distribution of the marital estate.

. . . .

37. The [p]laintiff has incurred attorney's fees to pursue her claim for alimony in an amount exceeding $3,500.00.

The trial court then issued conclusion of law number 9, in which the court concluded "[a]n award of attorney's fees is appropriate because the [p]laintiff is dependent, is entitled to an award of alimony and she had insufficient means [to] subsist during the prosecution of her claim and to defray the necessary legal expenses thereof." Based on these findings and conclusion, the trial court ordered that "[d]efendant shall reimburse the [p]laintiff for attorney's fees in the amount of $3,500.00 by July 1, 2018."

"As with [an] analysis for alimony, an analysis for attorney's fees requires a two-part determination: entitlement and amount." *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000). This Court explained that "[a] spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Id.* "Once a spouse is entitled to attorney's fees, our focus then shifts to the amount of fees awarded. The amount awarded will not be overturned on appeal absent an abuse of discretion." *Id.* at 375, 536 S.E.2d at 647. However, as with any award of attorney's fees, the trial court is required to make findings of fact as to the reasonableness of the fees based on the nature and scope of the legal services and the skill and time required. *See Williamson*, 140 N.C. App. at 365, 536 S.E.2d at 339.

Here, the trial court's findings of fact numbers 34, 35, and 37 establish that plaintiff was entitled to attorney's fees. The trial court, however, did not make any findings on which to base a reasonableness determination;

nor did the court find that the fees incurred by plaintiff were reasonable. The trial court simply awarded plaintiff $3,500.00 in attorney's fees based on its finding that "[p]laintiff has incurred attorney's fees to pursue her claim for alimony in an amount exceeding $3,500.00." Additional findings of fact are necessary to support the trial court's attorney's fee award in this case. *See Id.* ("[T]he trial court failed to make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the fees can be based. This failure effectively precludes this Court from determining whether the trial court abused its discretion in setting the amount of the award.") (quotation marks and citations omitted).

Plaintiff asserts additional findings are not required in this case because the amount of attorney's fees awarded was within the range requested and supported by the affidavit submitted by her attorney. In support of her argument, plaintiff cites *Barrett*, in which this Court upheld an award of $3,100.00 in attorney's fees based on affidavits showing plaintiff incurred $5,446.55 in attorney's fees. 140 N.C. App. at 375, 536 S.E.2d at 647. In *Barrett*, however, in addition to recognizing the attorney's fee award was within the range sought, this Court explained that "[t]he trial court also found that the hourly rates charged were reasonable and customary for that type of work[]" and "[the d]efendant ha[d] not contested this specific finding or otherwise suggested that plaintiff's counsel ha[d] charged excessively." *Id.* There are no such findings in the present case, and the lack of findings prevents this court from determining whether the trial court abused its discretion in awarding attorney's fees. The attorney's fees award must be remanded for additional findings.

III. Conclusion

For the reasons discussed, we vacate and remand for further proceedings and additional findings of fact to support the awards of child support, alimony, and attorney's fees.

VACATED AND REMANDED.

Judges DILLON and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 APRIL 2019)

IN RE A.M.A.T. No. 18-753	Wake (17JT21)	Reversed in Part; Remanded
IN RE A.T. No. 18-886	Wayne (16JA166)	Affirmed in part, Vacated in part and Remanded
IN RE D.L.B. No. 18-912	Wake (16JT38)	Affirmed
IN RE H.R.J. No. 18-995	Pamlico (13JT12) (13JT13) (13JT14)	Affirmed
IN RE K.S.K. No. 18-814	Alexander (16JT16) (16JT17) (16JT18)	16 JT 16: ORDER AFFIRMED. 16 JT 17-18: ORDERS AFFIRMED IN PART; VACATED AND REMANDED IN PART.
IN RE K.W. No. 18-816	Guilford (16JA527)	Affirmed in part, Vacated in part and Remanded
IN RE M.N.P. No. 18-824	Wake (16JT289-291)	Affirmed
IN RE N.T. No. 18-849	Martin (15JA44-52)	Affirmed in part and Remanded in part
IN RE N.T. No. 18-996	Martin (15JA44-51)	Affirmed in part and Remanded in part
IN RE T.M.L.E. No. 18-804	Guilford (16JT55) (16JT56) (17JT1)	Affirmed
LaMARRE v. MARTINEZ No. 18-224	Union (16CVS1013)	Affirmed
PALMER v. CLINE No. 18-924	Surry (16CVD1416)	Affirmed, As Modified

STATE v. DUFF No. 18-874	Guilford (14CRS92098-99)	Affirmed in part and remanded for correction of clerical errors.

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